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No. 95-668

In The

Supreme Court of the United States

October Term, 1995

AUCIELLO IRON WORKS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Employer is bound by a Union's "acceptance" of an earlier Employer proposal for a collective bargaining agreement when, at the time of the Union's "acceptance", the Employer had a reasonable basis for a good faith doubt of the Union's continued majority status, and expressed that doubt within a reasonable period of time after being advised of the final erosion of Employee support for the Union, but less than one day after the Union had telegraphed its "acceptance".

PARTIES TO THE PROCEEDINGS

National Labor Relations Board

Auciello Iron Works, Inc.

In accordance with Rule 29.6; Auciello Iron Works, Inc. hereby discloses that it has no parent, affiliates or subsidaries.

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2. The decision of the First Circuit Court of Appeals below is also inconsistent with the decision of the Court of Appeals for the Eleventh Circuit in *NLRB v. Bickerstaff Clay Products, 871 F.2d 980 (11th Cir. 1989)* determining that, under facts identical to those involved in this case, an Employer may reject a Union's "acceptance" of an Employer's earlier offer when the Employer has reason to believe that, at the time of the "acceptance", the Union no longer represented a majority of its employees 10

3. The decision of the First Circuit Court of Appeals below is inconsistent with the rationale of this Court in *NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)* where, notwithstanding the Union's "acceptance" of the Employer's earlier offer, the decision solely considered whether the Employer's rejection of that "acceptance" was based on the Employer's having an actual and reasonable good faith doubt as to the Union's continued majority status as of the date of the Union's "acceptance". If the decision of the First Court were correct, the existence of the Employer's good faith doubt would have been immaterial in view of the Union's having "accepted" the Employer's earlier offer prior to the Employer's having challenged the Union's majority status. 10

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

AUCIELLO IRON WORKS, INC., Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Auciello Iron Works, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled proceeding on July 21, 1995.

OPINIONS BELOW

The opinion and judgment of the First Circuit Court of Appeals, dated July 21, 1995 is reported at 60 F.3d 24. A copy of the opinion is reproduced in the Appendix at p. 1a. A copy of the Supplemental Decision and Order of the National Labor Relations Board dated May 9, 1995 is reported at 317 NLRB No. 60 and is reproduced in the Appendix at p. 9a. The earlier decision of the First Circuit Court of Appeals dated November 30, 1992 is reported at 980 F.2d 804, and is reproduced in the Appendix at p. 59a. The original decision and order of the National Labor Relations Board, incorporating by reference the original decision of the Administrative Law Judge of November 24, 1989 is reported at 303 NLRB No. 90 and is reproduced in the Appendix at p. 84a.

JURISDICTIONAL STATEMENT

On July 21, 1995, the First Circuit Court of Appeals entered judgment and opinion enforcing the Supplemental Decision and Order of the National Labor Relations Board dated May 9, 1995.

The jurisdiction of this Court to review the decision of the First Circuit Court of Appeals is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

29 U.S.C. Sec. 158(a)(1) and (5)

These provisions are reproduced, verbatim, in the Appendix to this Petition commencing at p. 1-a.

STATEMENT OF THE CASE

The Employer maintains an iron works fabrication shop located in Hudson, Massachusetts, and had enjoyed an amicable collective bargaining relationship with Local 501 of the Iron Workers' Union for a number of years. A series of collective bargaining agreements had been negotiated without incident over those years. After several negotiating sessions in 1988, the parties reached a tentative agreement with the Employer agreeing to the Union proposal for the economic terms of a wage increase. This agreement was brought back to the Union membership for employee ratification, and was rejected by the Union membership.

After unsuccessful efforts by the bargaining committees to refine the settlement package, a strike vote was taken by the Union membership and a strike commenced on October 14, 1988, with picket lines being placed at the Employer's plant. Some five weeks into the course of the strike and the picketing activity, a gradual erosion of employee support for the Union was evidenced, so that by the final week of the strike, the Employer noticed an increased deterioration of Union support. The factual basis upon which the Employer relied for its growing belief that the Union might no longer maintain a majority status was the fact that many of the employees had elected to cross the picket line, and/or had resigned from the Union and, more importantly, had made direct comments to upper management supervisory employees, affirmatively reflecting the bargaining unit employees' lack of support for the Union. As a result of the Employer's feeling that the support for the Union was on the down slide, the Employer, at the last negotiating session between the parties on November 17, 1988, advanced a proposal which

incorporated by reference the earlier points on which agreement had been reached, but took a harder line on other points. The Union then called off further negotiations, and immediately the Employer observed factors that supported their earlier impression that the Union support was deteriorating.

The picket line was withdrawn the next day, Friday, November 18, 1988, and the following week, the balance of the employees returned to work and continued to make strong comments to management representatives indicating their lack of any continuing support for the Union. Also during that week of November 21, a number of additional employees withdrew from Union membership. While the Employer was in the process of reviewing what, if any, actions would be appropriate in view of this final erosion of employee support for the Union, the Union sent a Sunday evening telegram to the home of the company president, purporting to "accept" the management offer which had been made prior to: (a) the withdrawal of the picket line; (b) the return to work of employees; (c) the withdrawal of Union membership by additional employees; and (d) the increased expressions of dissatisfaction with the Union being made by employees. Management representatives met with their attorneys the following Monday morning, November 28, 1988, and reviewed the Employer's revised assessment as to the now complete lack of employee support for the Union, and immediately advised the Union that it would no longer recognize the Union as the exclusive bargaining representative of the employees, and in view of the Union's clear lack of support among employees, its prior contract proposal was no longer available for "acceptance".

Based on an Unfair Labor Practice Charge filed with the Regional Office of the National Labor Relations Board alleging a statutory refusal to bargain by the Employer's refusal to consider itself bound by the Union's "acceptance" of the earlier management proposal, the Regional Office of the Board issued a Complaint on January 17, 1989, alleging the Employer violated the Act by withdrawing recognition from the Union and by refusing to execute an agreement with the Union.

Hearings were conducted before Administrative Law Judge Zankel on June 21, August 8 and August 9, 1989, and on November 24, 1989, the Administrative Law Judge issued a decision that the issue of the Employer's good faith doubt of the majority status of the Union was, in fact, immaterial, as the Union had "accepted" the Employer's proposal immediately prior to the Employer's withdrawal of recognition. The Administrative Law Judge determined that a collective bargaining agreement between the Employer and the Union came into existence upon the Union's transmittal of its Sunday evening, November 27, 1988, telegram purporting to "accept" the Employer's last proposal, and that the Employer's withdrawal the following day of recognition and refusal to execute an agreement was, therefore, unlawful.

Approximately a year and a half later, June 27, 1991, the National Labor Relations Board issued a three-paragraph order, affirming the Administrative Law Judge (Appendix, p. 84a). In connection with the NLRB attempting to seek enforcement of that Order in the United States Court of Appeals for the First Circuit, the Court affirmed a number of aspects of the NLRB Order, but agreed with the Employer that the NLRB decision which had merely cited prior NLRB determinations dealing with

instances where the Union's lack of support occurred only **after** the making of the agreement, and were, therefore, not a basis for determining a factual situation involving the Union's lack of support which existed **at the time** of the Union's efforts to "accept" the Employer's earlier proposal. The Court determined that the Board had "glossed over" what the Court determined to be the "tough question" presented in this case, namely whether a contract must be irrebuttably presumed where the Union effort to accept an earlier Employer proposal came at a time when the Union clearly lacked majority support. The First Circuit noted a then-recent decision of the Seventh Circuit Court of Appeals determining that an earlier management proposal was no longer available for "acceptance" by a Union which had clearly lost its majority support of the workers. *Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992).*

The First Circuit Court of Appeals further noted that in recent decisions, both before this Court as well as before the Eleventh Circuit, the Courts had become involved in the issue of whether the Employer had, in fact, a good faith doubt of the continued Union's majority in cases factually identical to the instant case, namely, when that good faith doubt was first raised by the Employer only immediately after the minority Union had attempted to "accept" an earlier management proposal. The matter was remanded by the First Circuit to the NLRB to address the apparent inapplicability of the prior Board precedent cited in its June 27, 1991 decision, as well as to address the apparent inconsistencies in the approach taken in prior matters, both with this Court as well as with the Eleventh Circuit, and to address the impact of the Seventh Circuit Court of Appeals decision in *Chicago Tribune, supra,* that an Employer's offer is no longer available to the Union

whose majority support has been clearly eroded subsequent to the tendering of the earlier management proposal. The Board was specifically directed by the First Circuit to "act with expedition" and to forward a copy of its Supplemental Decision to the Clerk of the First Circuit "as soon as it can".

Two and one-half years later, the Board issued its Supplemental Decision and Award wherein it determined that, for policy considerations of "industrial stability" and "employee freedom of choice", the presumption of majority status must prevail until the Employer expressly challenges that majority status. It further determined that, if an Employer has a good faith doubt as to the Union's continued majority status, it must initially raise that issue **before** the Union accepts its offer. In the factual context of this case, the Board's decision, in essence, stated that the fact that the Union moved quicker than the Employer by sending a Sunday evening telegram to the home of the company's president before the management's announcement of withdrawal of Union recognition, in the face of complete and obvious erosion of **any** Union support on the following day, a Monday morning, was dispositive of the case.

The matter was again reviewed by the United States Court of Appeals for the First Circuit on July 21, 1995 and it was determined that, in view of the Board's finally having announced an articulated policy-oriented basis for its determination, the Court would affirm that ruling. The Court specifically noted that, in adopting the Board's rule that an Employer may not raise the issue of the Union's majority status once the Union has "accepted" an earlier management proposal (even though the Employer attempts to raise this issue within a day or, in theory, within an hour

after the Union's "acceptance") that the Board was reaching "a result different from that by our sister circuit in *Chicago Tribune Co.*" (Appendix p. 7a).

REASONS FOR GRANTING THE WRIT

1. The decision of the First Circuit Court of Appeals below was acknowledged by that Court to be directly contrary to the decision of the Court of Appeals for the Seventh Circuit in *Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992).*

2. The decision of the First Circuit Court of Appeals below is also inconsistent with the decision of the Court of Appeals for the Eleventh Circuit in *NLRB v. Bickerstaff Clay Products, 871 F.2d 980 (11th Cir. 1989)* determining that, under facts identical to those involved in this case, an Employer may reject a Union's "acceptance" of an Employer's earlier offer when the Employer has reason to believe that, at the time of the "acceptance", the Union no longer represented a majority of its employees.

3. The decision of the First Circuit Court of Appeals below is inconsistent with the rationale of this Court in *NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)* where, notwithstanding the Union's "acceptance" of the Employer's earlier offer, the decision solely considered whether the Employer's rejection of that "acceptance" was based on the Employer's having an actual and reasonable good faith doubt as to the Union's continued majority status as of the date of the Union's "acceptance". If the decision of the First Court were correct, the existence of the Employer's good faith doubt would have been immaterial in view of the Union's having "accepted" the Employer's earlier offer prior to the Employer's having challenged the Union's majority status.

The factual situation involved in this case is a recurring one, wherein during the course of a prolonged

strike, the parties continue to negotiate and, when the gradually eroding employee support for the Union reaches a low ebb, the Union is generally inclined to grab "whatever it can" by attempting to "accept" the most recent Employer proposal, even though that Employer proposal was likely made by the Employer at a time when either: (1) the Union's support among bargaining unit employees was greater; or (2) the employer may not have been fully aware of the extent of the Union's lack of employee support. Where, as in this case, the Union's "acceptance" of the earlier Employer offer literally comes out of the blue and is sent in such apparent panic circumstances by being telegraphed on a Sunday evening to the home of the company's president only a few days after the final indicia of any employee support for the Union has vanished, the Employer is thus placed in a position where it must make a rapid assessment and determination of whether, at the time of the Union's effort to capture the benefit of a prior Employer proposal, the Union was, in fact, a representative of a majority of the bargaining unit employees. Prior decisions of other Circuit Courts of Appeals as well as the decision of this Court in *NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990)* have determined that the critical issue in such circumstances, where the Employer, after receiving such a Union attempt to "accept" a prior offer in the face of eroding employee support, is whether the Employer may reject in a timely fashion such an "acceptance" based on the Employer's good faith belief that the Union, at the time of its "acceptance", no longer possessed the support of a majority of the bargaining unit employees. Unlike the decision in this Court in *Curtin Matheson Scientific* and unlike the Seventh Circuit Court of Appeals' decision in *Chicago Tribune*, and unlike the Eleventh Circuit Court of Appeals' decision in *NLRB v. Bickerstaff Clay Prods. Co., infra*, the First Circuit Court of

Appeals determined that the question of the Employer's good faith doubt of the Union's majority status at the time of receiving such a telegram "acceptance" is immaterial, as the agreement is fully consummated by the Employer's receipt of the Union's "acceptance" and that "agreement" constitutes an irrebuttable presumption of the Union's majority status. Thus, the decision of the First Circuit Court of Appeals in this case is inconsistent with at least two other Circuits, as well as with the rationale of this Court.

In *NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989)*, cert. den. 493 U.S. 924 (1989), the Employer's last offer of November 6 was not accepted but, after further deterioration of the Union's majority status, was "accepted" by the Union on April 8th. As in the instant case, one day after receiving this "acceptance", management withdrew recognition from the Union and advised the Union that the prior offer was no longer available for "acceptance." While, unlike the instant case, both the Administrative Law Judge and the National Labor Relations Board decided the matter on the question of whether this subsequent expression by the Employer of its doubt of the Union's majority status was, in fact, based upon a good faith doubt, based on objective considerations (a matter which, in this case, the Board and First Circuit are now saying is immaterial, in view of the Union's having sent its "acceptance" one day prior to the Employer's withdrawal of recognition), the Board did argue before the Eleventh Circuit Court of Appeals, as it did in the instant case, that the prior offer of the Employer remained available for "acceptance", notwithstanding the Employer having reasonably concluded in the meantime that the Union no longer represented a majority of the bargaining unit employees. According to the Board's argument in that

case, the Employer's offer would be available for such "acceptance" until such time as the Employer expressly either withdrew the offer or withdrew recognition. The Eleventh Circuit Court of Appeals, unlike the First Circuit Court of Appeals in the instant case, determined that there was no such obligation to either withdraw the offer or withdraw recognition.

> "There is no authority cited by the Board, and none exists, for the proposition that withdrawal of a prior offer is a condition precedent to an employer's withdrawal of recognition based on a good faith doubt of the Union's majority status. If the circumstances changed such that the Employer reasonably believed that the Union no longer represented a majority of its employees on April 8, 1986, Bickerstaff had no duty to withdraw its offer by notifying the Union." *NLRB v. Bickerstaff Clay Products, 871 F.2d 980, 993-994 (11th Cir. 1989)*

The Court of Appeals in that case went on to determine that the Employer was within its rights in rejecting the Union's telegram "accepting" the Employer's prior offer and in withdrawing recognition from the Union, even though this was not done, as in the instant case, until one day after the Union had "accepted" the Employer's prior offer. This decision is, thus, clearly inconsistent with the First Circuit's decision in this case that, notwithstanding an Employer's legitimate, good faith doubt of the continuing majority status of the Union, it is bound by a Union "acceptance" of the Employer's most recent proposal.

Similarly, in *Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992)*, the Employer had engaged in a number of collective bargaining sessions with the Union and, after becoming aware of the nearly complete erosion of the Union's support among employees, had not specifically withdrawn its earlier offers to the Union. It was only several days after the Union's eventual "acceptance" of the Employer's earlier offer that the Employer, for the first time, formally took the position that at the time of the Union's "acceptance", it no longer represented a majority of the employees. As in the instant case, the National Labor Relations Board took the position that the acceptance of the Employer's earlier offer bound the Employer to a collective bargaining agreement, and it was too late for the Employer to maintain that, at the time of that "acceptance", the Union no longer represented a majority of the employees. That position was rejected by the Seventh Circuit Court of Appeals on the basic rationale that an Employer may not legally consummate an agreement with a Union when, at the time of that consummation, the Employer has reason to believe that the Union does not represent a majority of its employees. The Seventh Circuit Court of Appeals also placed great emphasis on the fact that to allow a Union to suddenly grasp an earlier Employer offer at a time when the Union's support has disappeared and, simply because the Employer has not formally withdrawn either the offer or its recognition of the Union, to force its employees to be bound by a collective bargaining agreement with a Union with whom they no longer have any allegiance is unduly and unnecessarily penalizing those employees. The Court drew careful distinctions between situations such as those involved in this case where, in the absence of any bad faith bargaining by the Employer, the Employer simply had not formally withdrawn its prior offer or Union recognition in

the face of the Union's eroding support and cases where the Employer refuses to comply with its statutory obligation to bargain in good faith and, as the result of such refusal, the employee support eventually erodes. The Court suggested that in the latter case, the Employer would not be in a position to reject the Union's acceptance of any Employer offer, as the Employer itself has illegally contributed to the erosion of the Union's support. There is no suggestion that any such circumstances existed in the instant case. The Court of Appeals for the First Circuit in the instant case expressly acknowledged that its determination would be contrary to this decision of the Seventh Circuit Court of Appeals in Chicago Tribune. (Appendix p. 7a)

The facts of the instant case are also remarkably similar to those involved in *Curtin Matheson Scientific v. NLRB, 859 F.2d 362 (5th Cir. 1988) rev'd. 499 U.S. 777 (1990)*. In that case, the Employer had made an offer to the Union on June 12th, and after serious erosion of Union support, the Union finally "accepted" the offer on July 16th. Four days later, the Employer declined the Union's "acceptance" and, for the first time, formally announced its withdrawal of that earlier offer, based on its doubts as to the Union's majority status as of the date the Union purported to "accept" the Employer's offer. The Fifth Circuit Court of Appeals determined that on those facts, there was no violation of Sections 8(a)(1) and 8(a)(5) by the Employer refusing to execute an agreement, and by withdrawing its recognition of the Union. Most significantly, unlike the Court of Appeals in the instant case, it did not consider a legitimate agreement to have been entered into simply by the Union's attempting to "accept" the Employer's last proposal. Obviously, if the Fifth Circuit had felt that the mere "acceptance" by the Union of the earlier Employer offer constituted an

agreement, there would have been no need for the Court of Appeals even to have considered the legitimacy of the Employer's claim, made four days after this "acceptance" as to the Union's lack of majority status.

On appeal, a majority of this Court determined that the Employer's asserted basis for its contention that the Union no longer maintained a majority status (the existence of a number of striker replacements which the Employer had assumed did not support the Union) was not a legitimate basis for the Employer's withdrawal of recognition. But, under the rationale of the First Circuit in the instant case, there would have been no need to have even reached that issue if the Union's "acceptance" of the Employer's earlier offer constituted a binding agreement, regardless of the Employer's feeling that the Union then no longer enjoyed a majority status.

Similarly, the extended dissenting opinions of four members of this Court determining that the Employer had not violated the statute by refusing to execute an agreement with the Union necessarily assumed that a binding contract was not consummated simply by the Union's "acceptance" of the Employer's earlier offer.

It is certainly a giant step for the Board, in this case, to expand the rule whereby an Employer is prevented from contesting a Union's majority status **during the term of an agreement** to the point the Employer is also prevented from questioning the **very existence and validity of that same agreement as having been consummated at a time when the Union lacked a majority status**. As the Seventh Circuit Court of Appeals noted in *Chicago Tribune Co.*, it is a classic bootstrap argument to maintain that the legality of the alleged consummation of an agreement

creating an irrebuttable presumption of the Union's majority status may not be attacked by a claim of the Union's lack of majority status at the time of the alleged consumption of that agreement.

In the instant case, the full implications of the Union's true lack of support were not highlighted until the picket line was withdrawn on Friday, November 18, 1988 and, during the course of the following week, when employees returned to work and resigned from the Union, and also continued to express a strong lack of support for the Union. It would indeed be a gross disregard for the rights of these various employees who had now clearly indicated their lack of support for the Union for the principle of law to be applied that, as soon as this lack of support finally became apparent, both to the Union and to the Employer, the fact that the Union won the race to the telegraph office by sending a telegram to the home of the company's president on Sunday evening, November 27th, the employees now have to be governed by a three-year contract "accepted" by a Union with which the employees clearly want no affiliation.

There could well be circumstances where an Employer involved in a factual situation identical to that in this case has improperly elected not to raise the majority status issue until some time in the distant future, so as to rid itself of what turned out to be an onerous Union agreement. That is not the situation in this case, as the Employer not only had not engaged in any collective bargaining sessions with the Union after the Union's picketing and striking had terminated, and other indications of employee non-support of the Union had been brought to the attention of the Employer, but it also **immediately** had disclaimed any obligation to deal further with the Union.

The Employer in this case certainly raised the issue within a reasonable time after becoming fully aware of the complete extent of the Employees' dissatisfaction with their Union and no bargaining sessions had been held in that time. Thus, to the extent the rationale of the Board is to the effect that an Employer may not have it both ways in becoming aware of the lack of the Union majority status and still, hopefully, attempting to negotiate a favorable agreement without waiving its ability to resist the Union's "acceptance" of the Employer's last proposal, that rationale is inapplicable to this case, as the Employer raised that issue on the very first business day after the week in which the Employees had all come back to work and expressed their dissatisfaction with the Union.

The Board's Supplemental Decision also seems to be premised on the contention that the Employer has sole control over the timing of its announcement that it was withdrawing Union recognition based on a good faith doubt of a lack of the Union's majority status, and elected not to withdraw its Union recognition. Clearly, the ability to withdraw Union recognition based on the Employer's good faith doubt that the Union maintains a majority status is not a matter which is based upon a precise mathematical formula, and an Employer who prematurely attempts to disavow its obligation to deal with the Union, based on the Employer's alleged good faith doubt that the Employer has lost its majority status is exposed to Unfair Labor Practice charges. Prior decisions of this same Circuit clearly indicate that an Employer must be absolutely certain and secure in its assessment of the factual basis for its alleged good faith doubt of the Union's majority status before attempting to rescind its relationship with the Union. *NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1051-1053 (1st Cir. 1991); Bolton-Emerson v. NLRB, 899*

F.2d 104, 16 (1st Cir. 1990). On the other hand, the Employer is faced with possible Unfair Labor Practice charges if, in fact, it **continues** its recognition of the Union when it clearly has reason to believe that the Union no longer enjoys a majority status. *International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731, 732-733 (1961).* It would be an unfair and unreasonable requirement to place a burden upon the Employer to have to go through the difficult and prolonged process of accurately evaluating the current majority status of the Union (at the peril of incurring possible Unfair Labor Practice charges)[1] and then having to decide whether or not to formally announce its disavowal of its obligation to deal with that Union within a matter of hours or even days of the Employer's first receiving the factual information which could serve as a possible basis for the conclusion that the Union no longer enjoyed a majority status.

While there surely would reach a time when the Employer's delay in making such a formal announcement to the Union would be considered to be unreasonably late, it is respectfully submitted that the facts of this case do not indicate any such delay on the part of the Employer, and its advising the Union on Monday, November 28th that it was withdrawing its recognition (an announcement made only days after the full impact of the employees' withdrawal of

[1] The dilemma faced by an Employer having to determine when it is permissible to assert its good faith doubt that the Union no longer maintains a majority status is demonstrated in the instant case where the Board's decision implies that the Employer waited **too long** to announce its decision, yet General Counsel, before the Administrative Law Judge, argued at length that, even as of November 28th, when the Employer announced its good faith doubt, the Employer did not yet have a sufficient factual basis for that good faith doubt.

Union support had been made apparent to the Employer), certainly was timely, and the ability of the Employer to make such a withdrawal should not be thwarted by the Union's having literally run to the Western Union office to send a Sunday evening telegram to the company's president, purporting to "accept" the last Employer offer. Such an insincere "acceptance" was obviously made at a time when both the Union and the Employer were aware that there was no longer any significant Employee support for the Union, and should not be treated as a bar to the Employer's timely and legitimate withdrawal of recognition from the Union.[2]

The Board itself, in its Supplemental Decision of May 9, 1995, recognized that, where the Employer's assertion of a good faith doubt is "simultaneous with the Union's attempt to accept the Employer's outstanding offer", difficult problems are presented and should be decided on a case-by-case basis. (NLRB Slip Op. p. 11-12) However, although the Board accepts the Employer's contention that much of the factual basis upon which the Employer finally concluded that the Union no longer enjoyed a majority status did not take place until the week of November 21, 1988 (Appendix p. 35a), it determined that the Employer's assertion of a good faith doubt only a few days later was "untimely".

Were the question simply one of Williston's application of principles of contract law, one could

[2] In an earlier decision, *Viking Lithographers, 184 NLRB 139 (1970)* which the Board has apparently now rejected, the Board had referred to such telegrams of "acceptance", sent at a time when the Union's employee support had clearly evaporated, as a "capitulated . . . contractual surrender" which would not place any obligation on the Employer to accept.

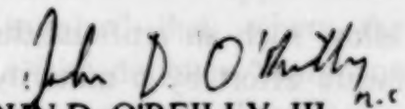
understand a ruling being made that an outstanding offer may be accepted by the one who wins the race to the telegraph office. However, such a ruling in a labor law context would completely deny the statutory rights of employees to be represented by a Union of their own choice, and in this case, the employees clearly no longer wished to have any affiliation with this Union. However, as the result of the NLRB ruling as eventually affirmed by the Court of Appeals below, the Employer, simply by being out-raced to the telegraph office, is deprived of the opportunity to present evidence reflecting the basis for his reasonable good faith belief that the Union had lost its majority status.

To allow such an artificial distinction based on a clearly insincere effort by a minority Union to bind the employees to a three-year agreement is clearly unwarranted. The Seventh Circuit, in *Chicago Tribune, supra*, determined that the bargaining rights of the employees would be improperly and unjustifiably thwarted if the Employer were not allowed, **based on facts known to it at the time** of the Union's "acceptance" (as opposed to facts which might subsequently come to the Employer's attention) to question the Union's majority status.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted to resolve the above-described split among various Circuit Courts of Appeals as to whether an Employer in the circumstances of this case may withdraw recognition from the Union and refuse to consider a Union "acceptance" of an earlier Employer proposal when, at the time of that "acceptance", the Employer has a reasonable and good faith doubt as to the Union's continued majority status.

Respectfully submitted,



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Dated: October 19, 1995

LABOR MANAGEMENT RELATIONS ACT

SEC. 8. (a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

United States Court of Appeals
For the First Circuit

No 91-1905

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AUCIELLO IRON WORKS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before

Selya, Circuit Judge,
Campbell, Senior Circuit Judge,
and Keeton,* District Judge.

John D. O'Reilly, III, with whom O'Reilly & Grasso was on brief for respondent.

Collis Suzanne Stocking with whom Jerry M. Hunter, General Counsel, D. Randall Frye, Acting Deputy General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, were on brief for petitioner.

July 21, 1995

* Of the District of Massachusetts, sitting by designation.

CAMPBELL, Senior Circuit Judge. Several years ago, the National Labor Relations Board ("the Board") petitioned this court for enforcement of an order it had issued against Auciello Iron Works, Inc. ("the Company") pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) ("NLRA"), We affirmed, in large part, the Board's decision underlying the order. NLRB v. Auciello Iron Works, Inc., 980 F.2d 804 list Cir. 1992). However, while retaining jurisdiction, we declined to enforce the order and remanded to the Board for further consideration of an issue which we found the Board to have inadequately addressed. The Board has now, at long last, responded by issuing a comprehensive supplemental decision and order addressing the problems raised in our opinion. Auciello Iron Works, Inc., 317 N.L.R.B. No. 60 (1995). Pursuant to our invitation, both parties have commented on the Board's opinion. We now grant the Board's petition for enforcement of its order.

The Board issued its original order upon concluding that the Company had committed an unfair labor practice in refusing to negotiate with the Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) ("the Union "). a union certified to be the exclusive collective bargaining representative for a

number of the Company's employees. Auciello Iron Works, Inc., 303 N.L.R.B. 562 (1991). During negotiations for a new collective bargaining agreement, the Union had accepted one of the Company's outstanding proposals.[1] The Company, however, subsequently refused to sign an agreement based on that proposal and withdrew its recognition of the Union .

In concluding that the Company had thereby committed an unfair labor practice, the Board affirmed the administrative law judge's refusal to consider the Company's defense that, at the time the Union accepted the Company's contract proposal, the Company entertained a good- faith doubt of the Union ' s majority status, The Board thus refused to allow the Company to present evidence that the Union in fact lacked majority support at the time it accepted the Company' s outstanding offer. In a footnote to its summary opinion, the Board wrote:

> We agree that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a

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[1] In opposition to the petition for enforcement, the company challenged the continuing availability, and the subsequent acceptance, of its proposal. In our previous opinion, we affirmed the NLRB's finding that the proposal was still open and that the union had accepted it. Auciello, 980 F.2d at 808-09.

respondent's alleged good-faith doubt of the union's majority status. Belcon, Inc., 257 NLRB 1341, 1346 (1981); North Bros. Ford, 220 NLRB 1021, 1022 (1975). Auciello Iron Works, Inc., 303 N.L.R.B. 562, 562 n.2 (1991).

Unsatisfied with the Board's brief treatment of this issue, we remanded for further consideration. Although we recognized that Board precedents clearly barred employers from raising a good-faith doubt about a union's majority status arising from events occurring after the parties reached an agreement, see, e.g., North Bros. Ford, Inc., 220 N.L.R.B. 1021, 1022 (1975), we found it less clear that such a prohibition extended to bar good-faith doubts arising from events occurring before the parties reached an agreement. We thus objected to the Board's casual extension of the "contract bar rule " to pre-agreement doubts about majority status , without any reasoned policy analysis to support that extension. We were further troubled by the fact that neither party had addressed the Seventh Circuit's decision in Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), which was handed down prior to oral argument in this case and which reached a result at odds with the Board's conclusion.

Unlike the Seventh Circuit, however, we did not undertake to pass ultimate judgment on the

appropriateness of the Board's policy judgment. We noted instead that the Board " has the chief responsibility for developing coherent and correct labor negotiation rules" and that the question "calls for the Board's reasoned application of its expertise." Auciello, 960 F.2d at 812, 813. We therefore remanded to the Board, ordering it to " revisit , clarify , and explain the principles that it thinks apply in the present circumstances." Id. at 812.

The Board has responded with a thorough supplemental decision in which it affirms its earlier conclusion, namely, that an accepted offer bars an employer from later raising, as a defense to an unfair labor practice charge, a good faith doubt about the union's majority status arising out of events occurring prior to the acceptance of the offer. Auciello Iron Works, Inc., 317 N.L.R.B. No. 60 (1995). Now, however, the Board has for the first time articulated the policy considerations underlying its rule, weighing both the advantages and disadvantages of varying rules in the specialized collective bargaining context. The Board found that the policies underlying the relevant provisions of the NLRA and earlier Board precedents supported extending the contract-bar rule to cover good faith doubts arising from events occurring prior to the acceptance. In particular, the Board found that the rule furthered the policy of preserving stable bargaining relationships and did not undermine the policy of preserving the workers' freedom to choose their own representatives . Pursuant to our

remand, the Board also considered the Seventh Circuit's opinion in Chicago Tribune, concluding that it was inconsistent with the policies underlying the NLRA.

As earlier stated, the Board's policy judgments on this type of question are entitled to substantial deference from the courts. "Especially as the relevant principles here are informed less by statutes than by Board policies set out in its decisions, the area is one where the Board's presumed expertise is key." Auciello, 960 F.2d at 812. The public, the bar, the parties, and the courts are entitled, however, to have the Board's key rulings supported by "articulate, cogent, and reliable analysis." Id. at 813 (citations omitted). Having at last the benefit of the Board's explanation, we are now satisfied, as we were not before, that the Board's decision is amply supported by rational application of its expertise. While the question is perhaps close, the Board's policy choice is reasonable and, as now articulated, quite persuasive. The Board's choice falls well outside the sphere of arbitrariness that might tempt us to substitute our own judgments for the Board's expertise on a question like this. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts.")

We accordingly accept the Board's ruling that, absent exceptional circumstances[2], an employer is barred

[2] The Company seeks to bring this case within the exception set forth in the Board's opinion for cases in which a company's good faith doubt arises simultaneously with the union's acceptance of the offer. See Auciello, 317 N.L.R.B. No. 60, at 11-12. We agree with the Board's implicit conclusion that this case does not fall within the exception, as the Company had all of the relevant information to support its claim prior to its acceptance of the offer.

in these circumstances from raising, after the union's acceptance of its outstanding offer, a defense of good faith doubt as to the union' s majority status premised on events prior to that acceptance. In adopting the Board's rule, we reach a result different from that of our sister circuit in Chicago Tribune, Co. , 915 F.2d at 250. The Seventh Circuit was, however, without the benefit of the Board's present analysis. We hope the time and effort expended in this case will cause the Board to avoid the kind of perfunctory, inarticulate decision-making that caused the present difficulties.

The Company argues finally that, even if we uphold the Board's decision, we should condition enforcement of the Board's order upon a Board-supervised election to ensure that the Union still enjoys the support of the workers. The Company cites NLRB v. LaVerdiere's Enter., 933 F.2d 1045, 1053 (1st Cir. 1991), in which we refused to enforce the Board's bargaining order and instead ordered an election where: (1) there existed a showing of substantial employee dissatisfaction with the union prior to the employer's

misconduct; (2) the employer's misconduct was less than egregious; and (3) there had been an inordinate delay in the Board's decision.

Although there is no doubt that a great amount of time has elapsed since the underlying unfair labor practice, we are disinclined to order, on our own initiative and contrary to the Board's requested relief, a Board-supervised election at this point. This case is distinguishable from LaVerdiere's, insofar as LaVerdiere's involved a clear showing of employee dissatisfaction with the union. In that case, the employees had filed a decertification petition with the Board, and had exhibited other substantial evidence of dissatisfaction. Id. at 1048, 1054. In this case, by contrast, although there existed evidence that the strike was losing employee support, the evidence that the Union was losing employee support fell far short of that in LaVerdiere's. Accordingly , without meaning to pass judgment on the propriety of an election should one be sought and considered in another context, we enforce the Board's order in its entirety. See id. at 1053 (holding that the Board's choice of remedy is entitled to deference).

The order of the Board will be enforced.

Notice: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board. Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Auciello Iron Works, Inc. and Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AF-CIO). Case 1-CA-25969

May 9, 1995

SUPPLEMENTAL DECISION AND ORDER BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

This case is on remand from the United States Court of Appeals for the First Circuit[3] The court has

[3] On June 27, 1991. the National Labor Relations Board issued its Decision and Order in this proceeding in which it found inter alia. that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from the Union and by refusing to, execute an agreed-on collective-bargaining agreement. 303 NLRB 562. Thereafter, the Board filed with the court a petition for enforcement of its Order. in an opinion dated November 30, 1992. the court remanded the case in part for further proceedings consistent with the court's opinion. NLRB v. Auciello Iron

instructed the Board to determine whether the Board erred in refusing to consider the Company's argument "that, in declining to recognize the Union or to bargain further with it, the Company was acting pursuant to a well-supported good-faith doubt that the Union still had majority support among those it supposedly represented."[4] The court questioned whether the Company should be permitted to present evidence that, at the time of the certified Union's purported acceptance of the Company's outstanding offer during negotiations for a successor labor agreement, the Union lacked majority support and was therefore incapable of creating by its acceptance a valid contract. The Board accepted the court's remand

A. Background: The Case Before the Board and the Court

The relevant facts are undisputed. The Respondent operates an iron fabrication shop. In 1977, the Board certified the Union as the collective-bargaining representative of the Respondent's production and

Works, 980 F.2d 804 (1st Cir. 1992).

By letter dated April 22 1993, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the court's opinion. The General Counsel and the Respondent filed statements of position with the Board.

[4] 980 F.2d at 813.

maintenance employees. Since that time, the parties have executed successive bargaining agreements. On September 21, 1988,[5] 4 days before the agreement then in effect was to expire, the parties commenced negotiations for a new agreement and met on several occasions in September and October. On October 13, the union membership voted to reject the Respondent's latest proposal and to strike. A strike commenced on October 14.

Negotiations continued on October 18 and November 17, when the Respondent presented numerous proposals. The picketing effectively ended by November 18. On November 27, the Union notified the Respondent by telegram that the unit employees had voted to accept the November 17 offer and to return to work.[6] On November 28, the Respondent sent the Union a telegram stating in pertinent part: "Employer now has reason to believe that Local 501 no longer represents a majority of employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations." In support of its contention, the Respondent relied, inter alia. on employee criticisms of and statements of disaffection

[5] All subsequent dates are in 1988 unless otherwise indicated.

[6] The court enforced the Board's findings that the Respondent's offer remained open and available for acceptance on November 17 when the Union accepted it. and that ratification by the union membership was not a precondition to the formation of a contract These issues are not before the Board in this proceeding.

with the Union, abandonment of the strike by several employees, and the refusal of other employees to strike, all of which occurred prior to the Union's November 27 acceptance of the Respondent's proposals.

The strike ended as stated in the Union's November 27 telegram, but the Respondent refused to sign a collective-bargaining agreement containing the terms of its November 17 proposals. No further negotiations occurred.

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract and by withdrawing recognition from the union. The Respondent contended, inter alia, that it had a good-faith doubt that the Union continued to represent a majority of the unit employees, and on this basis disclaimed any further obligation to bargain with the Union.

The administrative law judge found that after the Union accepted the Respondent's contract offer, the parties had formed a valid contract and the Respondent could not rely on a good-faith doubt of the Union's majority status to withdraw recognition or avoid its contractual bargaining obligations. The judge therefore found it unnecessary to consider whether the Respondent's alleged good-faith doubt was supported by reasonable and objective evidence. The Board adopted the judge's findings that the Respondent violated the Act as alleged, stating:

> [U]nder established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority status. *Belcon, Inc.*, 257 NLRB 1341, 1346 (1981); *North Bros. Ford*, 220 NLRB 1021, 1022 (1975).[7] We also agree with the judge that the Board's decision in *Bickerstaff Clay Products*, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense

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[7] In *Belcon*, as here, the employer withdrew recognition after the union accepted its contract offer, relying on conduct that occurred prior to acceptance to support its alleged good-faith doubt. There, the Board adopted the judge's finding that the respondent's withdrawal of recognition was unlawful because "it was during the term of the newly negotiated agreement and at a time when it was not lawfully permissible for [r]espondent to do so." 257 NLRB at 1346.

The Board in *North Bros. Ford* held that once the parties reached final agreement on the substantive terms of the contract. the employer was not free to refuse to bargain even if it had lawful grounds for believing that the union had subsequently lost its majority status.
220 NLRB at 1022.

In *Bickerstaff Clay Products*, the Board found that the employer had not met its burden of establishing a good-faith doubt, where as here, the respondent first raised the doubt after the union had accepted its offer.

even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in *Belcon*.[8]

In its opinion, the court questioned the Board's reliance on *North Bros. Ford*, stating that the Board failed to address the Respondent's contention "that a lack of majority status on the date the Union purported to accept the Company's outstanding offer should be distinguished from a good faith doubt of majority status based on events occurring after a valid contract was made," as in *North Bros. Ford*.[9] The court questioned whether the acceptance of a contract offer by a union that lacks majority support at the time of acceptance can create a valid and binding contract that prevents the employer from withdrawing recognition or otherwise refusing to bargain based on an alleged lack of majority status during the contract term.

In asking for a clearer explication of the Board's position, the court instructed the Board to address the Seventh Circuit's decision in *Chicago Tribune Co. v. NLRB*,[10] which, relying on Ladies *Garment Workers , v. NLRB*,[11] denied enforcement of the Board's Order that the

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[8] 303 NLRB at 562 fn 2.

[9] 980 F.2d at 812. The court acknowledged that *Belcon* was not so limited

[10] 965 F. 2d 244, 250 (7th Cir. 1992), rehearing denied Nos. 91-2750, 91-2916 (June 24, 1992, denying enf. 303 NLRB 682 (1991).

employer recognize and bargain with the union.[12] The Seventh Circuit observed that the Board's approach in Chicago Tribune appears to conflict with the firmly established principle that an employer may not contract with a minority union.[13]The First Circuit in this case also

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[11] 366 U.S. 731 (1961).

[12] *Chicago Tribune Co.*, 303 NLRB 682 (1991) (where parties reached agreement and formed a binding contract, the employer was not entitled to rely on conduct that occurred prior to the contract's formation to support a good-faith doubt of the Union's continuing majority status as a defense to 8(a)(5) allegations; there were no changed circumstances that would have led parties reasonably to conclude that the respondent's offer was withdrawn).

[13] The Board in Chicago Tribune adopted without comment the administrative law judge's detailed rationale for requiring an employer to raise the good-faith doubt defense to, an 8(a)(5) allegation prior to the formation of an otherwise valid contract The judge dismissed the difficulty of litigating the concept of a "good-faith doubt" that is first expressed after a contract is reached, particularly when the employer is seeking to show the doubt as it existed in the employer's mind at the time of the contracts formation. Describing such an inquiry as too subjective. the judge reasoned that the relevant inquiry should instead be whether changed circumstances exist to vitiate an outstanding contract offer accepted before the refusal to bargain. The judge found that because the factors on which the respondent relied to support in good-faith doubt were present and known at the time the respondent renewed its offer, they were not changed circumstances" that would have led both

noted that in two other cases the Board appears to have overlooked altogether its *North Bros. Ford* and Belcon precedent" and "allowed an employer to litigate an issue of good faith doubt after the union had accepted an outstanding offer": *Curtin Matheson Scientific, Inc.*,[14] and *Bickerstaff Clay Products Co.*,[15] 980 F.2d at 812 (emphasis in original). stating that it was "without policy

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parties reasonably to conclude that the respondent had withdrawn the offer. Therefore, the judge concluded in good-faith doubt defense failed because it was not conveyed to the union prior to the formation of the contract. 303 NLRB 690-691.

As indicated the Seventh Circuit in denying enforcement in *Chicago Tribune* focused on the statutory issues raised by Sec. 8(a)(2). The court found that the Board's Rule that a union's acceptance of offer creates a binding contract, if applied in the context of a loss of majority support" would violate the principle of *Ladies Garment Workers*, 366 U.S. at 737-738, that an employer may not contract with a "minority union" would give too much weight to the interests of unions and too little weight to the interests of employees, and would authorize "sweetheart deals" between companies and unions at the employees' expense. The court also suggested that the Board's blocking charge rule unfairly prevents employers from challenging a union's majority status, a factor not present here. 965 F.2d at 250.

[14] 287 NLRB 350 (1987). enf. denied 859 F.2d 362 (5th Cir. 1988), rehearing denied 864 F.2d 791 (5th Cir. 1988), revd. 494 U.S. 775 (1990), on remand 905 F.2d 871 (5th Cir. 1990).

[15] 286 NLRB 295 (1987), enf denied 871 F.2d 980 (11th Cir. 1989), cert. denied 493 U.S. 924 (1989).

guidance and reasoned analysis to decide the issue," the court remanded the case, instructing the Board "to revisit, clarify and explain the principles that it thinks apply to the present circumstances," and to explain the application of precedent in factually distinguishable situations.[16]

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[16] 980 F.2d at 812-813.

Although some of the court's language in ordering a remand in this case refers to an "actual loss" of majority status as well as a good-faith" doubt of majority status, there is a significant distinction between a case involving a claim of actual loss of majority status and one involving a claim of good-faith doubt. As the Supreme Court stated in *NLRB v. Curtin Matheson Scientific, Inc.* 494 U.S. 775, 787 fn. 8 (1990), unlike in an actual loss of majority status case, an employer need not show an actual numerical loss of majority support to prove a good-faith doubt and may rely instead on circumstantial evidence to satisfy its burden of proof. We emphasize that this case involves only the issue of whether the Respondent had good-faith doubt that the Union retained majority support. In fact at no point in the proceedings before the Board or the court did the Respondent urge that the Union had suffered an actual loss of majority support and there has been no finding that, or discussion of whether, the Union actually lacked majority status when it accepted the Respondent's final contract offer. As the Respondent stated in its supplemental brief to the Board: "[T]he issue which has been remanded to the Board by the Court of Appeals is whether an employer who, at the time of a Union's effort to accept a previously expressed management proposal, has a good faith doubt of the Union's continued majority status, may refuse to execute an agreement based on that Union's

B. Contention of the Parties

The General Counsel contends that the Board should adhere to its decisions in *Belcon and Chicago Tribune* and affirm its findings that the Union's acceptance of the Respondent's offer created a valid contract that precluded the Respondent from demonstrating its alleged good-faith doubt. As a basis for this contention, the General Counsel relies on the presumptive majority status of a union during the life of a contract The General Counsel further argues that a rule permitting an employer to "sit" on a purported doubt to await the outcome of contract negotiations and to raise its doubt because of subsequent dissatisfaction with the contract would encourage employers to manipulate the bargaining process resulting in "inequity and ... destabilize[d] bargaining relationships." The General Counsel also contends that reliance on *Ladies Garment Workers* is misplaced because the union in that case, unlike the certified Union here, had never enjoyed majority support when the employer granted recognition.[17]

'acceptance' and whether it should be allowed to present evidence to support its claim that, at the time of the Union's 'acceptance' it had a basis for such good faith doubts. "Therefore, we address here only the Respondent's good-faith doubt in defense in evaluating the 8(a)(5) violations alleged.

[17] Finally, the General Counsel maintains that if the Board reaches the merits of the Respondent's good-faith doubt defense, the Respondent did not have the necessary objective evidence to support its alleged good-faith doubt The Respondent contends to

The Respondent, citing *Ladies Garment Workers*, contends that the Board's refusal to consider its alleged good-faith doubt violates the principle that an employer may not enter into an agreement with a minority union and that the Board's general rule that a contract offer is open for acceptance until an employer expressly withdraws it must be conditioned on the union's maintaining majority status through acceptance. Arguing that this case involves a contract forced on management by a minority union, the Respondent further contends that the Board's result forces unwanted representation on employees in the same way as occurs when a colluding union and employer, faced with a loss of the union's majority support and the possibility of a decertificaxion petition, sign a contract in violation of Section 8(a)(2) and (1) and Section 8 (b)(1)(A).

Finally, the Respondent maintains that the Board's refusal to consider its alleged good-faith doubt is inconsistent with *Curtin Matheson Scientific. Inc.*, above, and *Bickerstaff Clay Products*, above. and with the Board's decision in *Viking Lithographers*.[18] The Respondent argues that the Board, in contrast to this case, permitted the employers in each of those cases to litigate an alleged good-faith doubt as a defense to 8(a)(5) charges when the refusal to bargain was based on the employer's

the contrary.

[18] 184 NLRB 139 (1970).

rejection of the union's purported acceptance due to an alleged erosion of the employers' union support.

As noted above, the Board has accepted the court's remand. As the court has reminded us, our responsibility is to develop coherent and correct legal standards governing labor negotiations and to explain their application to the relevant facts. The precise issue before us is whether, when negotiations for a collective-bargaining agreement after the certification year has ended have culminated in the union's acceptance of an employer's contract proposals, an employer may withdraw recognition or otherwise refuse to bargain by presenting objective evidence, in existence and known to the employer before acceptance, to support a good-faith doubt that the union lacked majority status at the time of acceptance.[19]

For the reasons below, we reaffirm our findings that the Union's acceptance of the Respondent's November 17 proposals created a valid and binding contract, and that the Respondent was not thereafter entitled to present evidence of a good-faith doubt as a defense to the allegation of an 8(a)(5) violation.

We have structured our analysis to respond to the court's concerns. After discussing the Board's

[19] As our analysis will make clear, this case does not involve an employer's voluntary initial recognition of a union or an alleged actual loss of a union's majority status. See fns. 14, supra, and 74, infra.

presumptions regarding a certified union's majority status and the statutory policies that the presumptions further, we set forth legal principles, based on statutory, practical, and policy considerations, governing when an employer lawfully may refuse to bargain based on an alleged good-faith doubt. Our discussion accords with and elaborates on the administrative law judge's analysis in *Chicago Tribune*. As instructed by the court, we also analyze the statutory issues the Seventh Circuit raised in *Chicago Tribune*. In this regard, we examine the specific conduct prohibited by Section 8(a)(5) and (2) of the Act, discuss the applicability of these provisions to the Respondent's withdrawal of recognition, and consider analogous cases in which Congress, the Board, and the Supreme Court have resolved the tension between the policies arising out of obligations imposed by Section 8(a)(5) and those imposed by Section 8(a)(2).

C. *The Boards Mandate and the Presumptions Respecting a Certified Union's Majority Status*

The Board's mandate in administering the Act is to further industrial peace and labor relations stability by encouraging the practice and procedure of collective bargaining while preserving for employees the right to choose, or to refrain from choosing, a bargaining representative.[20] In enforcing the nation's labor laws, the

[20] See 29 U.S.C. Sec. 151.

Board seeks to balance these dual objectives while recognizing that the overriding policy of the Act is "industrial peace."[21]

The Board has established several presumptions respecting a union's majority support in order to further industrial peace by promoting stability in collective-bargaining relationships without impairing the free choice of employees.[22] The presumptions "indicate the relationship between the existence of a Board certificate and the right of an employer to question a union's majority in good faith."[23] At the outset, it is well settled that absent unusual circumstances a union enjoys an irrebuttable presumption of majority status during the first year following its certification. After the certification year (and in the absence of a collective-bargaining agreement), the presumption of majority status remains, but becomes rebuttable.[24] An employer may rebut the presumption of majority status by establishing either (1) that at the time of the refusal to bargain a majority of employees did not in fact support the union, or (2) "that the refusal was predicated on a good-faith and reasonably

[21] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 38-39 (1987); *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

[22] See *Fall River*, 482 U.S. at 38-39.

[23] *Celanese Corp. of America*, 95 NLRB 664, 671 (1951), overruled in part on other grounds *Hawaii Meat Co.*, 139 NLRB 966, 968 (1962).

[24] *Fall River*, 482 U.S. at 37-38 (and cases cited therein).

grounded doubt, supported by objective considerations, of the union's majority status." [25]

A valid collective-bargaining agreement also affects the presumptions of majority status. In general, a union enjoys an irrebuttable presumption of majority status during the contract term.[26] On the contract's expiration, the presumption becomes rebuttable.[27] The issue here arises at the time the rebuttable postcontract term presumption would become the irrebuttable contract term presumption and raises the question whether that change in status can occur when an employer asserts that it had objective evidence to support a good-faith doubt of majority status before or at the time the union accepted its offer, but had failed to raise such a doubt until after the agreement was reached pursuant to that acceptance.[28]

[25] *Burger Pits, Inc.*, 273 NLRB 1001, 1001 (1984), enfd. 785 F.2d 796 (9th Cir. 1986).

[26] We note, however, that with the exception of the healthcare industry and seasonal operations, a rival representation or decertification petition may be filed during that "window" period which is more than 60 days but less than 90 days before the expiration date of the existing contract of 3 years' duration or less.

[27] *Burger Pits*, 173 NLRB at 1001 (and cases cited therein).

[28] See *Chicago Tribune Co.*, 965 F. 2d at 250.

The First Circuit in remanding the present case stated that the Board's decisions regarding the availability of the good-faith doubt defense after the parties have reached a binding agreement

As the Supreme Court in *Fall River* noted, the Board bases its presumptions of majority status not on absolute certainty that the union's majority status will not erode following certification, but rather on carefully considered policy choices intended to further the Act's objectives. The Court, commenting approvingly on the Board's presumptions concerning majority support for an incumbent union, explained how the presumptions promote industrial peace:

> In essence, [the presumptions] enable a union to concentrate on obtaining and fairly administering a collective bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and will be decertified. ... The

are based on the contract bar rule. 980 F.2d at 810. Under that rule, a contract meeting certain requirements is valid and will bar an election. See generally *Hexton Furniture Co.*, 111 NLRB 342 (1955). Although the Board has on occasion framed its discussion of a union's continuing majority support during the term of a contract in terms of the contract bar rules (see, e.g., *Westwood Import Co.*, 251 NLRB 1213, 1213-1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982)). we emphasize that the precise rule of law applicable here is the irrebuttable presumption that a union retains majority status during the contract. We note, however, that the same policy underlies both the presumptions of majority status and the contract bar rules: achieving a reasonable balance between industrial stability ad employee freedom of choice. See *Crompton Co.*, 260 NLRB 417, 418 (1982), and discussions below.

> presumptions also remove any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees . . . . The upshot of the presumptions is to permit unions to develop stable bargaining relationships with employers, which will enable the unions to pursue the goals of their members, and this pursuit, in turn, will further industrial peace.[29]

D. *Circumstances Under Which an Employer May Withdraw Recognition Based on Good-Faith Doubt*

In accord with the court's instructions, we now examine when an employer may lawfully withdraw recognition or otherwise refuse to bargain based on a good-faith doubt of a certified union's continuing majority status. Before addressing the facts here, we set forth two related rules and their rationales.

1. Within a reasonable time before a collective-bargaining agreement expires, an employer that establishes a good-faith doubt of a union's majority status may announce that it does not intend to negotiate a new agreement.[30] Additionally, after the contract has expired,

[29] 482 U.S. at 38-39 (citations and footnotes omitted). Although the issue in *Fall River* concerned a successor employer's obligation to bargain under the Act we find that the Court's discussion of the rationale supporting the presumptions is also pertinent to the issue presented in this case.

[30] *Burger Pits*, 273 NLRB at 1001.

an employer is entitled to raise a good-faith doubt of a union's continuing majority status at any time prior to a union's acceptance of its contract proposals.[31] The existence of a good-faith doubt is a question of fact. The employer has the burden of proving that it had a reasonable, good-faith belief that the union no longer represented a majority of the bargaining unit employees.[32] Although the good-faith doubt must be reasonably grounded and supported by objective considerations known to the employer, the employer need not conclusively demonstrate that a majority of its employees

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[31] This was, in fact the situation present in *Viking Lithographers*, in which the Board found that where the parties during contract negotiations had not reached a complete agreement the employer did not violate Sec. 8(a)(5) and (1) by withdrawing recognition from the union based on reasonable objective factors to support its good-faith belief that the union had lost majority status. Specifically, the Board found that although the union had accepted the respondent's purported "final offer," there was in fact no final offer "comprising a complete contract." 184 NLRB at 139-140. We therefore reject the Respondent's contention that *Viking Lithographers* is dispositive here, and we find that case factually distinguishable from the present one. We reaffirm our finding in our initial decision, as enforced in pertinent part by the court that unlike in *Viking Lithographers*, the parties here had reached a complete and binding agreement when the Respondent sought to withdraw recognition.

[32] *Pilgrim Industries*. 286 NLRB 244 (1987).

no longer desire to be represented by the union.[33] When, however, an employer fails to assert a good-faith doubt by announcing it and acting on it during the period when the presumption is rebuttable, no evidence exists from which to infer that the employer has rebutted the presumption of the union's continuing majority. From a practical standpoint the placement of the burden of proof on an employer stabilizes labor relations-and protects employee free choice--by prohibiting an employer from withdrawing recognition or refusing to bargain without first adducing objective evidence of its employees' desires to no longer be represented by the union.

2. We reaffirm the rule set forth in *North Bros. Ford* that a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good-faith doubt of the union's majority status based on events occurring after acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition. This rule is based on the fact that before or at the time the contract was formed no one had questioned the majority status of the union and the consequent validity of the agreement. As the Supreme Court reasoned in *Fall River*, this rule promotes industrial peace and labor relations stability by enabling a union to concentrate on obtaining and fairly

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[33] *NLRB v. Randle-Eastern Ambulance Services*, 584 F.2d 720, 728 (5th Cir. 1978).

administering its collective-bargaining agreements without the concern that, absent immediate results, it will lose majority support and be decertified.[34]

3. Turning to the facts of this case, we reaffirm the principle applied in our initial decision and in the Board's decisions in *Chicago Tribune* and *Belconz*: where objective evidence to support a good-faith doubt of a union's majority status is known to the employer before a union's acceptance of the employer's contract offer but the employer does not act on that evidence prior to acceptance, the union's acceptance creates a valid collective-bargaining agreement. Therefore, an employer that disclaims its bargaining obligation in reliance on a good-faith doubt at that point violates Section 8(a)(5) of the Act. Further, the employer is precluded during the contract term from withdrawing recognition or otherwise refusing to bargain based on an alleged good-faith doubt that the union lacked majority status at the time of acceptance. We adhere to this rule for the following reasons.

E. *Statutory Considerations Arising from Section 8(a)(5)*

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. The Supreme Court in *First National Maintenance Corp. v.*

[34] 482 U.S. at 38-39.

NLRB described the labor policies furthered by the statutory bargaining obligation:

> A fundamental aim of the [Act] is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. ... Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management... Congress ensured that collective bargaining would go forward by ... giving [the NLRB] the power to condemn as unfair labor practices certain conduct by unions and employers that it deemed deleterious to the process, including the refusal "to bargain collectively."[35]

Relying on this mandate, we agree with the administrative law judge in *Chicago Tribune* that it is inconsistent with the concept of good-faith bargaining for the Board to adopt a rule that an employer may continue to bargain-and thus to treat the union as the representative of a majority of its employees-by leaving its contract offer on the table to await the outcome of negotiations before deciding whether to raise a doubt of the union's majority support based on grounds that it knew existed prior to the formation of the contract. [36]

[35] 452 U.S. 666, 674 (1981) (footnotes and citations omitted).

Case law supports this interpretation of the obligations imposed by Section 8(a)(5). The Board's development of the good-faith doctrine in *Celanese Corp.* makes clear that the issue of whether an employer's questioning of a union's majority status is in good faith depends not only on whether reasonable grounds exist for believing that the union lost majority support, but also on whether the employer *sought to control the timing of the assertion of the doubt* to undermine the union's representational role. The Board cautioned:

> [T]he majority issue must *not* have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union.[37]

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[36] The Board and the courts have held that the common law rule that a rejection or counterproposal terminates an offer has little relevance in the collective-bargaining setting. In collective bargaining, an offer will remain on the table and be capable of acceptance unless the offeror explicitly withdraws it or changed circumstances would lead both parties reasonably to believe that the offer was withdrawn. *Chicago Tribune Co.*, 303 NLRB 682, 690 (1991) (citing *NLRB v. Burkart Foam*, 848 F.2d 825, 830 (7th Cir. 1988)).

[37] 95 NLRB at 673 (emphasis in original).

In a similar vein, the Court in *Fall River* explained that the presumptions of majority status remove any temptation to avoid good-faith bargaining in the hope that by delaying, an employer will unfairly undermine the union's majority status.[38] Thus, the Board has found that an employer's claim of good-faith doubt is neither held in good faith nor reasonable where the employer did not raise it until the parties had fully agreed on a contract, even though the claim was based on information known to the employer throughout bargaining.[39] Similarly, the First Circuit itself has heldthat an employer lacked good faith where, despite the employer's doubts aboutthe union's majority status it had entertained prior to negotiations, it entered into negotiations "hoping to get a contract to its liking."[40]

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[38] 482 U.S. at 38.

[39] *Bennett Packaging Co.*, 285 NLRB 602, 608 (1987). See also *King Radio Corp.*, 208 NLRB 578, 584 (1974), enfd. 510 F.2d 1154 (10th Cir. 1975), cert. denied 423 U.S. 839 (1975) (Board found employer's claim of doubt asserted as a defense to, withdrawal of recognition, was not held in good faith where it knew of the factors relied on to establish its doubt during negotiations but failed to raise the doubt until the parties were close to reaching agreement on a contract the employer did not want).

[40] *Bolton-Emerson, Inc. v. NLRB*, 899 F. 2d 104, 107 (1st Cir.1990) enfg. 293 NLRB 1124(1989).

F. *Practical and Policy Considerations*

The Board's emphasis on the timeliness of the employer's manifestation of its good-faith doubt, by, e.g.,withdrawing recognition or petitioning for an election,furthers the same principles and is in complete accord with our rationale for the two rules discussed above. The employer controls whether or when its doubt will be asserted. As noted above, without an employer's objective manifestation of the doubt, there is no doubt cast on the union's authority to bargain with the employer, and thus, no obstacle to the union's binding the employer by accepting the employer's contract offer.

Further, we share the awareness of the administrative law judge in *Chicago Tribune* of the practical difficulties of litigating a doubt alleged to have been held before or at the time the contract was reached but on which the employer did not act until after the contract was reached. As he suggested, a determination of the critical issue of whether an employer had a reasonable doubt, held in good faith but not articulated, at an"earlier unspecified time"--presumably prior to the union's acceptance of the employer's contract offer--would involve an inquiry into matters too speculative and subjective "not only to vitiate that contract but to dissolve the bargaining relationship."[41] Instead, as discussed above, the existence of a good-faith doubt of majority support is a

[41] 303 NLRB at 691.

question of fact, and to demonstrate it, the employer must show, inter alia, that the doubt is grounded in objective, demonstrable evidence.[42]

Thus, practicalities support the rule that, if an employer is aware of objective evidence to support a good-faith doubt *before* the union accepts its offer, it must, for the defense to be timely raised, act on this doubt before the union accepts its offer. Further, and this policy choice goes to the heart of the First Circuit and Seventh Circuit's concerns, if an employer fails to raise a doubt based on known preacceptance factors until after acceptance, the Board will not view those factors as "changed circumstances" vitiating the employer's offer or the contact's validity. Board recognition of the factors supporting the doubt as changed circumstances would defeat in large part the purpose of denying the employer the privilege of raising the after-the-fact doubt defense--it would vitiate a contract as to the validity of which no doubts had been raised at the, time it was formed.

Accordingly, we reaffirm as consistent with our statutory mandate and the practicalities of case litigation the rule that once the union accepts the employer's offer, in the absence of a previous assertion of good-faith doubt or other changed circumstances to call into question the union's competence to enter into a contract, the parties

[42] (40) See generally *Brown & Root U.S.A.*, 308 NLRB 1206 (1992), and *Laidlaw Waste Systems*, 307 NLRB 1211 (1992).

have fonned a valid contract precluding the employer from raising a good-faith doubt or refusing to bargain with the union during its term.[43]

Having reaffirmed that the Respondent could not raise its alleged good-faith doubt as a defense to its withdrawal of recognition and refusal to execute the contract, we find it unnecessary to pass on whether the Respondent presented sufficient objective evidence to support a reasonable, good-faith doubt of the Union's majority status. However, some features of the Respondent's evidence illusaate the practical difficulties of determining, without a timely assertion of doubt accompanied by appropriate action, *when* an employer possesses sufficient objective evidence to support an alleged good-faith doubt.[44]

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[43] We note that an employer's ability to manipulate the timing of its good-faith doubt defense and the difficulty of litigating tbe issue given that fact have influenced our approach in this case. Our focus here does not, however, necessarily carry over into other areas that do not present the same policy considerations. For example, in the case before us, the statutory period of limitations began to run when the Respondent refused to execute the contract and asserted that it was withdrawing recognition from tbe Union, not when tbe Respondent formed its good-faith doubt.

[44] Member Cohen does not rely on general pronouncements concerning tbe timliness of an employer's assertion of a good-faith doubt of majority status. He confines himself to the specific facts of this casee, i.e.. the assertion of tbe

The court found that the Respondent relied on events prior to the Union's November 27 acceptance to support its good-faith doubt, asserted on November 28. Ralph Auciello, the Respondent's vice president, testified that *after* receiving the Union's telegram, management met on November 28, discussed each employee's union sentiment, and that "at that time, it was clear to me that the union did not represent the men." He attributed this belief to employees' oral statements of dissatisfaction with the Union over several months. For example, Auciello admitted that one employee's statement that the Union was a joke could have been made immediately after the strike began or "6 months before." He could not recall the most recent conversation with an employee who did not support the Union, but testified that "quite a few" discussions occurred on November 18 and that some of the conversations took place the week of November 21.[45]

According to Auciello, November 28 was the first time that the Respondent discussed the Union's majority status "in such depth" and that management had not discussed the issue previously because contract

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doubt after a contract offer has been accepted in circumstances where tbe assertion is based on facts that were known prior to acceptance.

[45] See *Bolton-Emerson*, 293 NLRB at 1129, enfd. 899 F.2d at 107 (company representative's testimony that the company entertained good-faith doubt throughout negotiations conclusive of bad-faith bargaining).

negotiations were ongoing.[46] Auciello admitted, however,that management prepared a list of employees indicating who was likely to vote against union reptesentation "toward the end of the strike"[47] and "on or before" November 28. The Respondent did not take any action on one list because negotiations were ongoing and because the document represented a "worst case scenario."

Auciello's testimony makes it clear that the Respondent harbored its doubt while its contract offer was outstanding. If we were to permit Respondent to "sit" on that doubt and to raise it after the offer is accepted, we would effectively permit an employer to unilaterally control a vital part of the collective-bargaining process. An employer with such a doubt would then not only be able to act on it and nullify the offer, but also it could wait until the offer is accepted and then vitiate the contract. If the Board's policies were to permit an employer to retain complete control over when to act on its purported doubt, control that can even invalidate after the fact a union's prior, appropriate, and good-faith bargaining acts, the demonstration of that doubt, with its profound legal and

[46] We note that Auciello testificd that he did not take notes about the employees' antiunion sentiments until the Respondent began to prepare its response to the Union's November 27 telegram.

[47] We note that the picketing ended on November 18 and that the Union called off the strike in its November 27 telegram.

practical consequences, becomes amenable to post-hoc reasoning and self-serving interpretations.

G. Section B(a)(2), *Ladies Garment Workers, and Balancing Employee Free Choice Against Bargaining Stability*.

Our affirmation of *Belcon*, which we applied in our initial decision, is based on the obligations imposed by the statutory duty to bargain in good faith under Section 8(a)(5). The Seventh Circuit in *Chicago Tribune*[48]maintained, however, that irrespective of whether an employer continues to negotiate by leaving an offer on the table, Section 8(a)(2),[49] which protects the right of employees to decide for themselves whether to be represented, requires consideration in determining the availability of the good-faith doubt defense.[50] According to the *Chicago Tribune* court, applying *Ladies Garment Workers*, the interests of the majority of employees who had not desired representation when the contract was formed dictate that the employer should not be estopped

[48] We note that the Seventh Circuit issued its decision in *Chicago Tribune* after the instant case was argued before the First Circuit

[49] Sec. 8(a)(2) prohibits an employer from dominating or interfering with the formation or administration of any labor organization or from contributing financial or other support to it.

[50] 965 F.2d at 250.

from withdrawing its offer and refusing to bargain with the union based on an alleged good-faith doubt of the union's majority status even though it might have been at fault for leaving its offer on the table and inviting acceptance by the union.

In *Laies Garment Workers*, the employer voluntarily recognized a union based on a good-faith but mistaken belief that the union represented a majority of the unit employees. The Court heid that by extending recognition to a minority union, regardless of its bona fide belief in the union's majority status, the employer violated Section 8(a)(2), and that by its acceptance of exclusive bargaining authority the union violated Section 8(b)(l)(A). The Court held that a grant of exclusive recognition to a minority union is unlawful because the union so favored is given "a marked advantage over any other in securing the adherence of employees."[51]

We respectfully disagree that *Ladies Garment Workers* resolves the issue here. As an initial matter, this case is factually distinguishable from *Ladies Garment Workers*. The instant case concerns a certified union and the employer's obligation to bargain with it as enforced by Section 8(a)(5), whereas *Ladies Garment Workers* involved the emp!oyerr's inadvertent voluntary recognition of a union the majority of its employees never supported in violation of Section 8(a)(2). Additionally,

[51] 366 U.S. at 738 (citing NLRB v. Pennsylvania Greyhound Lines,303 U.S. 261. 267 (1938)).

this case, unlike Ladies Gannent Workers, occurred in the context of ongoing negotiations and the shifting balances of power caused by an economic strike, as discussed below. It follows from these distinctions, as well as from the different legislative purposes of the two provisions, that different accommodations between the dual interests of furthering labor relations stability and ensuring employee freedom of choice are appropriate.

Thus, *Ladies Garment Workers* presented a fundamentally different issue from the one presented here.That case involved an employer's *recognition* of a nonincumbent, initially organizing, *actual-minority* nion. This case, on the other hand, involves the Respondent's *withdrawal of recognition* of the incumbent, *presumptively majority* Union. In *Ladies Garment Workers*, the employer's asserted good-faith belief that the union had *achieved* majority status at the time of recognition was no defense to its unlawful recognition;in this case, the issue is whether the Respondent's asserted good-faith belief that the Union had lost its presumptive majority status is a validly raised defense to its withdrawal of recognition.

H. *Statutory Considerations-Section 8(a)(2)*

The violation in *Ladies Garment Workers* arose under Section 8(a)(2). The gravamen of an 8(a)(2) violation is the domination or interference by an employer with the formation or administration of any labor

organization. Congress' goal in enacting Section 8(a)(2) was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion.[52] The Court in *Ladies Garment Workers* made clear that the violation found was the employer's initial grant of exclusive representation status to a union that had not been chosen by a majority of its employees.[53]

We respectfully disagree with the Seventh Circuit's finding in *Chicago Tribune* that the employers' conduct in *North Bros. Ford* and *Belcon*, and therefore also in the instant case, is prohibited by Section 3(a)(2). The Board's presumptions of continued majority status under Section 8(a)(5) operate only to mainain lawfully established continuing bargaining relaionships.[54] In *Ladies Garment Workers*, following the employer's unlawful recognition of the minority union, the Board voided the agreement and the union was no longer presumed to be the majority representative. By contrast, the Union in this case was not recognized unlawfully, but was the certified representative of the Repondent's unit employees. A Board-certified election clarifies beyond question a union's status as the emloyees' exclusive collective-bargaining representative.[55]

[52] *Electromation Inc.*, 309 NLRB 990, 994 fn. 18 (1992).

[53] 366 U.S. at 736.

[54] *Royal Coach Lines v. NLRB*, 838 F.5d 47, 51 (2d Cir. 1988).

[55] See *W.A. Krueger Co.*, 299 NLRB 914. 916 fn. 18 (1990). Members Stephens and Cohen do not rely on this and

Before acceptance of the Respondent's offer, when the Union was operating under a rebuttable presumption of continued majority support, there was no legally cognizabie evidence that continued bargaining would involve dealing with a minority union. Rather, the presumption was unchallenged at the time of acceptance, even though the Respondent and the unit employees themselves were free to attack it. Under the circumstances, Section 8(a)(2) does not preclude a finding that the parties formed a valid agreement preserving the Union's presumptive majority during the contract's term. Thus, the aim of Congress in enacting Section 8(a)(2)-to prevent employers from foisting representatives on unwilling employees[56]-is not frustrated by the presumption's protection of the status of certified incumbent union against post-hoc attack.[57]

Thus, we respectfully disagree with the courts in this case and *Chicago Tribune* to the extent that they hold

subsequent references to *W. A. Kreuger*.

[56] *Electromation*, 309 NLRB at 994.

[57] We further note that contrary to the Seventh Circuit's suggestionn in *Chicago Tribune*, the Board's blocking charge rule does not prevent an employer from challenging a union's majoriry status. An employer is entitled to secure evidence to support an alleged good-faith doubt despite the pendency of a decertification petition and is privileged to withdraw recognition based on tangiblee evidence of a loss of majority support. See *Atwood & Morrill Co.*, 289 NLRB 794 (1988).

that 8(a)(2) considerations require that an employer be permitted to raise a "reasonable doubt" defense to an 8(a)(5) withdrawal-of-recognition violation where the objective considerations assertedly supporting the reasonable doubt existed *before* the union accepted the employer's contract offer, but the reasonable doubt itself was not expressed by the employer until after the union accepted the contract offer.

I. *Voluntary Recognition as Distinct from Board Certification*

The procedure used to accord recognition to a union also affects the duration and effect of the presumption of majority status. When a union is certified following a Board-supervised election, the presumption of majority status generally remains irrebuttable for 1 year. Voluntary recognition, however, presents risks to stable bargaining relations not present where employees have chosen a union through a Board-conducted election. Thus, when an employer voluntarily recognizes a union, the Board has set the period of irrebuttably presumptive majority at a less definite "reasonable time"for bargaining.[58] Without the safeguards of a Board conducted election, voluntary recognition can lead to recognition of a minority union, as occurred in *Ladies Garment Workers*. In this case, although the certification year had ended, the

[58] See *Royal Coach Lines*, 838 F.2d at 51-52.

Union remained the presumptive majority representative of the unit employees when it accepted the Respondent's offer. The Union's longstanding status as the employees' certified bargaining representative distinguisbes it from the uncertified union in *Ladies Garment Workers*; and the national labor policy of stabilizing bargaining relationships[59]supports, from a policy perspective, our finding that the Respondent's attempted withdrawal of recognition posed a risk to stable bargaining relations not addressed by Section 8(a)(2), but falling within the purview of conduct prohibited by Section 8(a)(5) of the Act.[60]

[59] See *Excel Corp.*, 313 NLRB 588, 589 (1993), discussed below. See also *Edison Sault Electronic Co.*, 313 NLRB 753 (1994) petitioner precluded from filing unit clarification petition after contract agreement reached but prior to ratification where petitioner did not reserve the right during bargaining to file; decision extends Board's Rule and policy that to entertain a unit clarification petition during the term of a contract which defines the bargaining unit would disrupt the bargaining relationship); *Union Plaza Hotel & Casino*, 296 NLRB 918, 918 fn. 4 (1989), enfd sub nom. *E. G. & H. Inc. v. NRLB*, 949 F.2d 276, 278, 280 (9th Cir. 1991) (employer may not repudiate agreement formed but not yet signed by arguing that the unit is inappropriate because it contains statutory supervisors).

[60] We note further that an employer that has voluntarily recognized a union is permitted to defend an 8(a)(5) complaint allegation by introducing evidence demonstrating a lack of

J. The Significance of an Economic Strike During Bargaining and Shifting Balances of Power

The Seventh Circuit in *Chicago Tribune* also warned that finding a valid contract on tbe union's acceptance of an employer's offer notwithstanding that "the union lost the support of the workers" between the

majority at the time of recognition. If the employer is successful, the presumption of majority status ends. See *Moisi & Son Trucking*, 197 NLRB 198 fn. 2 (1972); *Concord Services*, 310 NLRB 821, 822 (1993). This defense, of course, is cognizable only when recognition has occurred within 6 months of the filing of the related unfair labor practice charge. See *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 313 (1989), enfd. mem 138 LRRM 2160 (6th Cir. 1991); *Jim Kelley's Tahoe Nugget*, NLRB 357 (1976), enfd 584 F.2d 293 (9th Cir. 1978), cert denied 442 U.S. 921 (1979). However, the Board's decision in *Burger Pits*,273 NLRB at 1001, suggests that even in voluntary recognition cases, once tbe parties have formed a valid collective-bargaining agreement an employer cannot challenge the union's majority status during the conract's term in order to avoid the bargaining obligations imposed by the agreement This finding reflects the Board's policy, discusscd above, of preserving enduring bargaining relationships.

Members Stephens and Cohen do not pass on the issue of whether an employer can challenge a contract based on the minority status of the union at the time of recognition, where such recognition occurred less than 6 months prior to the challenge.

offer and its acceptance would undermine employee free choice because the resulting agreements would be "sweetheart deals" between the company and the union.[61] As a practical matter, because many good-faith doubt cases occur during strikes, we find that "sweetheart" deals are less likely in this context than the court prophesied.

A strike is defined by discord between the union and the employer to gain bargaining power. In this atmosphere, an employer and a union struggling to reach agreement on contract terms, or an employer hoping to oust a union throughh weakening it during the strike,would be unlikely to conspire to bar a decertification petition, or a representation petition by another union despite their knowledge of lack of majority status. Here, far from hoping to keep a minority union in place at the employees' expense, the Respondent prepared forms for employees to resign from the Union, thus seeking to alter the prevailing balance of power and weaken the Union's economic position. The Union's eventual acceptance of the Respondent's contract offer was not collusive; it was a recognition of the Respondent's increased bargaining strength as the unit employees abandoned the strike. Yet even after the Union capitulated to the Respondent's offer, the Respondent still sought to terminate, rather than continue, the bargaining relationship.[62]

61 965 F.2d at 250.

62 In contrast to the good-faith doubt cases involving

K. *Balancing Statutory Considerations*

The court's remand calls on us to determine whether the Respondent can rely on the employees' statutory right of free choice to justify withdrawing recognition from the Union. We have found that the Respondent's conduct in bargaining with the Union does not come within the gravamen of an offense under Section 8(a)(2). However, as the Respondent's conduct implicates the employees' statutory right of free choice, we shall examine the Board's and the Supreme Court's accommodations of the dual interests in employee free choice and stable bargaining relations. We have consistently recognized in our prior decisions that employee free choice may be outweighed, in some circumstances and in limited appropriate degrees, by the goal of industrial stability, and this approach has found favor in the courts.

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certified unions, cases involving voluntary recognition-and thus cooperation-between an employer and a union present a more likely context for sweetheart deals to occur. For example, in *Baby Watson Cheesecake*, 309 NLRB 417 (1992), the Board found that the employer and the voluntarily recognized incumbent union unlawfully executed a renewal agreement when faced with an organizing campaign by a rival union, despite their knowledge that the incumbent union did not enjoy majority status.

In *Bryan Mfg. Co.*, the Supreme Court held that where a collective-bargaining agreement was executed at a time when the union did not represent a majority of the unit employees, complaints alleging lack of majority status were barred by Section 10(b) of the Act when they were filed more than 6 months after the execution of the agreement. In so finding, the Court recognized the competing interests at stake--employee self-determination versus burying stale disputes in the interest of stability-and concluded that Congress had decided the appropriate balance by establishing the 6-month statutory limitations period. Thus, the minority status of the union could not be litigated once the statutory period had run "even at the expense of the vindication of statutory rights."[63]

In cases involving lawful bargaining relationships where Congress has not determined the outcome of the accommodation analysis, the Supreme Court has refused to allow employers to rely on assertions of employees'

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[63] 362 U.S. at 429. By the same token, the Board has acknowledged employers' interests in maintenance of a status quo that has developed in the absence of timely action by the bargaining representative. Thus, for example, if more than 6 months pass after a union is on notice of an employer's refusal to execute a bargaining agreement, the Board will not entertain an 8(a)(5) charge on any continuing violation theory, since parties to a collective-bargaining relationship must "be able to assess their obligations to each other expeditiously and with reasonable certainty." *Chambersburg County Market*, 293 NLRB 654, 655 (1989).

rights to justify refusals to bargain. In *Brooks* v. NLRB,[64] the Court held that the employer was obligated to bargain with the certified union even if shortly after the election and through no reason attributable to the employer the union lost its majority support. After recognizing that the Board has proedures through which parties can petition the Board for release from their bargaining obligations, the Court stated:

> The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it.. . .
>
> In placing a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded common-law doctrines of agency.[65]

In *Franks Bros. Co. v. NLRB*,[66] the Court affirmed the Board's Order that an employer bargain with a union which had lost its majority following the employer's unlawful refusal to bargain with it. The Court stated that such an order involves no "injustice to employees who

[64] 348 U.S. 96 (1954).
[65] 348 U.S. at 103.
[66] 321 U.S. 702 (1944).

may wish to substitute for the particular union some other . . . arrangement," because "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[67] Similarly, in the situation where the Board has issued a bargaining order to remedy an employer's unfair labor practices, the argument has been made that a bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' Section 7 rights of free choice. The Supreme Court rejected this argument in *NLRB v. Gissel Packing Co.*[68] by pointing out that [t]here is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petion." And, in the situation where the Board issued an affirmative bargaining order because it found that a successor employer did not have a good-faith doubt of the incumbent union's majority status when the employer refused to recognize that union, the Fourth Circuit recently held that even though such an order "infringes upon" and "restricts employees' freedom of choice," such

[67] 321 U.S. at 705 (citations omitted). See also *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950) (claim of an intervening loss of majority no defense to a proceeding for enforcement of an order to cease and desist from certain unfair labor practices).
[68] 395 U.S. 575, 613 (1969).

"a restriction does not ... render the remedy inappropriate," because "[i]t does not fix a permanent bargaining relationship between the employer and the union" and "[a]fter a reasonable period, the employees will be free to reject the union, if they so choose . . . ." *NLRB v. Williams Enterprises*, No. 94-1294, slip op. at 13-14 (4th Cir. Apr. 6, 1995).

In addition to Court precedent, Board decisions involving challenges to incumbent unions' status offer further guidance in analyzing, from a policy perspective, the limits on the Respondent's right to challenge the Union's majority status. In *Excel Corp.*, the Board refused to permit the decertification petitioners to submit signatures in support of their showing of interest after the expiration of the window period. The parties in *Excel* executed a successor agreement after the window period expired. Emphasizing that the parties had an enduring bargaining relationship, the Board found that to permit a decertification election based on untimely signatures would "unjustifiably place at risk the collective-bargaining agreement and the bargaining relationship between the Employer and the Union."[69]

In *W. A. Krueger Co.*, the Board held that an employer may not make unilateral changes in employees'terms and conditions of employment after a

[69] 313 NLRB at 589. Member Stephens, who dissented in *Excel Corp.*, and Member Cohen find it unnecessary to rely on the above discussion.

union loses the tally in a decertification election but before a certification of results issues. Although recognizing that an employer may act unilaterally at its peril in an initial certification where it has no preexisting duty to bargain,[70] the Board found that different interests prevail respecting a decertification petition, as it is filed in the context of an existing bargaining relationship where the employer has a duty to bargain over changes in unit employees' terms and conditions of employment. The Board found that its Rule-i.e., that election results are not final until a certification issues-promotes stability "while the Board determines whether the apparent employee choice was freely made."[71] Finally. the Board majority, in addressing the dissent's concerns that an employer might be compelled to bargain with a minority union, stated:

> [B]y referring to the confusion that can exist over a union's status and an employer's corresponding obligations, our colleague has inadvertently highlighted a compelling reason for establishing a date certain for a losing union's change in status.[72]

[70] See *Mike O'Connor Chevrolet-Buick-GMC*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[71] 299 NLRB at 916-917.

[72] 299 NLRB at 918 fn 21. We note that the Board in *Krueger* relied on two decisions that similarly reflect the Board's interest in preserving existing bargaining relationships: *Dresser Industries*, 264 NLRB 1088 (1982) (Rule permitting an

From a policy perspective, then, the delineation of a precise point in time when a certified union's majority status ceases to be rebuttable promotes stability during the period when the union's status is in doubt.

The Supreme Court and the Board did not base these decisions on the certainty that the incumbent unions continued to represent a majority of the unit employees. Rather, these cases reflect the policy determination that bargaining relationships should remain
stable in the face of challenges to an incumbent union's status As both the Court and the Board have observed, this policy is particulariy compelling where, as here, the parties have maintained an enduring collective-bargaining relationship.[73]

We emphasize that the intent of these cases is not to impose bargaining relationships and representation on unwilling employees. However, the cases suggest that

employer to withdraw from bargaining solely because a decertification petition has been filed does not give weight to the incumbent union's continuing presumption of majority status); and *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982) (Rule that mere filing of a representation petition by an outside union does not require or permit an employer to withdraw from bargaining with an incumbent union furthers stable bargaining relations and insures employee free choice.)

[73] See. e.g., *Excel Corp.*, 313 NLRB at 588. See also *Krueger*, 299 NLLRB at 915-918.

with respect to *employers*, permissible methods of self-help to select and reject bargaining agents--in this case assertion of a good-faith doubt and attempted withdrawal of recognition-must be carefully circumscribed to prevent stable labor relations from being undermined by total employer control.[74]

Like we did in *Krueger*, we have established a date certain-a union's acceptance of an employer's contract offer-after which *an employer* cannot challenge the majority status of a certified union based on an aleged good-faith doubt. We believe that as a policy matter, the stability resulting from this principle outweighes its potential adverse impact on employee freedom of choice. We further believe that our policy choice stabilizes enduring bargaining relationships, and gives the bargaining agreement that was formed while the union' s presumed majority status remained unrebutted a chance to succeed.

[74] See *Brooks*, 348 U.S. at 103. Compare the Supreme Court's decision in *NLRB v. Curtin Matheson*, 494 U.S.at 794-796 (Board's refusal to adopt an antiunion presumption regarding the views of stike replacements is consistent with the Act's overriding policy of achieving industrial peace because it limits employers' ability to oust a union without adducing any evidence of the employees' union sentiments and encourages negotiated solutions to strikes).

L. *Cases Involving Extraordinary Circumstances*

We recognize that extraordinary circumstances may arise in which a union's acceptance of an employer's final contract offer and the employer's assertion of a good-faith doubt are simultaneous.[75] For example, employees may first present signed petitions stating that they do not want to be represented by a union at virtually the same time that the union accepts an employer's contract offer. In such infrequent instances, the Board will evaluate case by case whether an employer is permitted to raise a good-faith doubt of the union's majority status. Further, the possibility that an employer may be permitted to raise a good-faith doubt that developed contemporaneously with a union's purported acceptance of its offer does not affect the principle that a union and an employer are not permitted to continue bargaining if the union has actually lost its majority scatus and the employer and the union are aware of this actual loss.[76]

[75] Cf. Royal Coach Lines v. NLRB, 838 F.2d 47 at 54, in which the court, in the context of a discussion of the burden of proof in voluntary recognition cases, recognized the possibility that an employer might provide evidence to cast a serious doubt of majority support for the union immediately prior to or contemporaneous with voluntary recognition.

[76] See *S.M.S. Automotive Products*, 282 NLRB 36, 41-44 (1986); *Clark Equipment Co.*, 234 NLRB 935 (1978), on remand 249 NLRB 660 (1980). In the initial *Clark* decision, the Board found that the General Counsel established a prima facie case that the employer knowingly bargained with a union that had lost majority status. In so finding, the Board found that the evidence presented went beyond "naked claims" and included a specific listing of employees who had purportedly signed authorization cards for a rival union. No such arguments are made here. In the second *Clark* decision, however, the Board found that most of the key events established in the General counsel's prima facie case an relied on by the Board previouly did not, in fact, occur, an therefore that the employer did not violate the Act. Cf. *Quality Hardware Mfg. Co.*, 307 NLRB 1445 (1992). We further emphasize that the case before us does not involve allegations of an actual loss of majority status.

M. *Reconciling Curtin Matheson and Bickerstaff*

Finally, we find that tbe Board's decisions in *Curtin Matheson Scientific, Inc.*, 287 NLRB 350 (1987), and *Bickerstaff Clay Products Co.*, 286 NLRB 295 (1987), although they may appear to be inconsistent with our result here, do not indicate shifting or poorly defined Board policies. The Board's analyses of the cases before it are guided implicitly by the manner in which the cases are pled and litigated and, more explicitly, by the issues raised in the parties' exceptions. In both *Curtin Matheson* and *Bickerstaff* the parties did not litigate the timeliness of the employers' good-faith doubts even though they were asserted after the unions' acceptances of the respondents' outstanding contract offers. Instead, the parties framed

and argued the issue to the Board in both cases as whether the employers had met their burden of demonstrating a good-faith doubt. The focal point of each case in enforcement proceedings narrowed even more and became whether, in evaluating the employers' evidence, the Board should entertain the presumption that sniker replacements do not support the union.

The court in this case accepted the Board's insistence that it was not deliberately abandoning *Belcon* in considering the merits of the employers' good-faith doubts in *Curtin Matheson* and in *Bickerstaff*. Rather, the court characterized the Board's evaluation of the good-faith doubt defenses in those cases as "an unwitting oversight encouraged, perhaps, by a readiness . . .to secure review of an important substantive issue."[77] Although the resulting appearance of inconsistency is unfortunate, we agree with the court's assessment.[78]

N. *Conclusion*

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[77] 980 F.2d at 812.

[78] In *Curtin Martheson*, the Supreme Court reversed the Fifth Circuit's opinion and beld that the Board had acted within its discretion in refusing to adopt an antiunion in refusing to adopt an antiunion presumption regarding strike replacements. To the extent that the lower courts' opinions in *Curtin Matheson* and *Bickstaff* have not been overruled they are of limited precedential value.

We previously found that the Union's acceptance of the Respondent's outstanding contract offer on November 27 created a valid collective-bargainine agreement. The Respondent asserted a good-faith doubt for the first time on November 28, relying on events that occurred prior to the formation of the contract For all the reasons set forth above, we reaffirm our finding that the Respondent is precluded from demonstrating that it had a good-faith doubt of the Union's majority status at the time of acceptance. We therefore adhere to our previous findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a written contract with the Union and by withdrawing recognition.

ORDER

The National Labor Relations Board reaffirms its order in the underlying proceeding, 303 NLRB 562 (1991), and orders that the Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

Dated, Washington, D.C. May 9, 1995

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
For the First Circuit

NO. 91-1905

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
AUCIELLO IRON WORKS, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
Selya, Circuit Judge
Campbell, Senior Circuit Judge,
and Keeton, * District Judge.

John D. O'Reilly, III, with whom O'Reilly & Grasso was on brief for respondent.

Collis Suzanne Stocking with whom Jerry M. Hunter, General Counsel, D. Randall Frye, Acting Deputy General Counsel, and Aileen A. Armstrong,

Deputy Associate General Counsel, were on brief for petitioner.

November 30, 1992

* Of the District of Massachusetts, sitting by designation

CAMPBELL, Senior Circuit Judge. The National Labor Relations Board petitions for enforcement of its order issued against Auciello Iron Works, Inc., on June 27, 1991, pursuant to section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). We decline to enforce the order at this time, retain jurisdiction and remand for further proceedings.

Background

Respondent, Auciello Iron Works, Inc. ("the Company") is an employer engaged in commerce within the meaning of sections 2(6) and (7) of the National Labor Relations Act ("NLRB"). The Company operates an iron fabrication shop in Hudson, Massachusetts, and employs approximately 23 production and maintenance workers. In 1977, the National Labor Relations Board ("NLRB") certified the Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) ("the

Union"), to be the exclusive collective bargaining representative of employees within a unit that included the Hudson facility's production and maintenance workers. Since 1977, the Company has negotiated and entered into several collective bargaining agreements with the Union.

On September 21, 1988, four days before the collective bargaining agreement then in effect was to expire, the Company and the Union began negotiations for a new agreement. The Union was represented in the negotiations by the International representative Robert Thomas, its local president David Mortimer, and one Joseph Parenti. The Company was represented by its attorney John D. O'Reilly, its controller Gerald Sauer, and its plant superintendent Manlio DeGrandis.

On September 30, 1988, the Company presented contract proposals and the parties discussed wages, medical insurance premiums and pension plans. Following the meeting, the Union's membership rejected proposals emerging from that meeting. Shortly thereafter, on October 4 or 5, 1988, representatives of the Company and the Union reviewed their respective positions. Thomas suggested to Company representative O'Reilly that if the Company would adopt the Union's contract proposal, there would be no need to submit it to the membership for a vote. Nothing came of this suggestion.

On October 13, 1988, the Company modified its proposals but the Union's negotiating team declined to accept them. It agreed, however, to submit the modified

offer to the membership without a recommendation. The membership voted to reject the Company's offer and to strike the next day.

The Company and the Union met on October 18, 1988 with a federal mediator. The Union made a proposal which the Company declined. The stalemate continued through the parties' next meeting on October 26, 1988.

On November 17, 1988, the Company and the Union met again with a mediator. The Company made oral proposals on wages, overtime and medical insurance premiums, and written proposals on grievance arbitration, supervisory performance of unit work, and management rights . The written proposals contained changes from the expired contract. The Union team requested that it be allowed to caucus in order to study the proposals. After doing so, it decided it needed more time to consider them. The team asked for an adjournment of the bargaining session. The mediator advised the Company's representatives of this request. The Union negotiators then left the negotiating room, neither rejecting nor otherwise responding to the Company's proposals. The Company took no action to withdraw its offer.

Three days later, on November 20, 1988, Thomas, for the Union, telephoned Company representative O'Reilly to ask if there was any point in meeting again. O'Reilly replied that he did not envision any change in the Company's position. O'Reilly reported Thomas' call to controller Sauer. Nothing was said on behalf of the

Company by way of withdrawing its November 17 proposals. After calling O'Reilly, Thomas telephoned Mortimer, the Union's local president, and informed him what had occurred. Thomas told Mortimer to advise the Union members to accept the Company's proposals of November 17 and to end the strike. Mortimer did so, and was able to reach eight to ten of the 23 employees.

On November 26, 1988, Mortimer reported to Thomas that the employees he polled had agreed to accept the Company's offer of November 17 and to return to work. On behalf of the Union, Mortimer sent the Company a telegram on November 27, 1988, stating:

> After careful consideration the proposed contract submitted by your company on November 17, 1988 to Local Union 501 has [been] unanimously ratified in its entirety by our negotiating committee. The strike at your plant has concluded as of this date and the employees have been advised to return to work on Monday November 28, 1988.

The Company's management representatives met to discuss their beliefs concerning the loyalties of various employees to the Union on November 28, 1988. After the meeting, the Company's attorney O'Reilly sent a telegram to the Union stating:

> Employer position in response to your notice of November 27 is as follows: 1. Employer offer of November 17, was rejected by Local 501 and is no longer open for unilateral acceptance. 2. In any event your claimed ratification limited to the negotiating committee and excluding rank and file membership is insufficient. Employer now has reason to believe that Local 501 no longer represents a majority of the employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations.

The strike ended as stated in the Union's telegram, but the Company refused to sign a contract with the Union based upon the November 17 proposals. The Union then filed an unfair labor practice charge and an amended charge with the NLRB against the Company on December 1, 1988, and January 17, 1989, respectively. In the charges the Union alleged that since November 28, 1988, the Company had refused to bargain with the Union in violation of section 8(a) (5) and (1) of the NLRA, by refusing to execute a collective bargaining agreement and by withdrawing recognition from the Union as bargaining agent for those unit employees.

The regional office of the NLRB issued an unfair

labor practice complaint on January 17, 1989. Hearings were conducted before an Administrative Law Judge ("ALJ"). Sauer, the Company's controller, testified that on November 17 the Union negotiators had "stormed out" of the negotiating room without responding to the Company's proposals. He and Thomas both conceded, however, that the Union had not expressly rejected the Company's proposals. Sauer further conceded upon Cross-Examination that the Company had not removed its proposals from the bargaining table on November 17.

On November 24, 1989, the ALJ issued a decision concluding that the Company's November 17 proposal was still outstanding when the Union accepted it on November 26, hence the Company's later refusal to sign an agreement based upon this proposal, and its withdrawal of recognition, were refusals to bargain in violation of section 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1).

The NLRB, without opinion, affirmed the ALJ's rulings, findings, and conclusions and substantially adopted his recommended order.[79] See Auciello Iron

[79] The Board stated in a footnote: We agree . that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority status. Belcon, Inc., 257 NLRB 1341, 1346 (1981); North Bros. Ford, 220 NLRB 1021, 1022 (1975). We also agree with the judge that the Board's decision in Bickerstaff Clay Products, 286 NLRB 295 (1987),

Works, Inc., 303 NLRB No. 90 (1991). The Board ordered the Company to cease and desist from the unfair labor practices found, and required it, upon request of the Union, to put in writing, sign, and effectuate, retroactively to November 27, 1988, the collective bargaining agreement that the Union had accepted on that date. The order further required the Company to make whole, with interest, the employees to whom that agreement applied for lost wages and other benefits suffered as a result of the Company's refusal to execute the agreement.

The NLRB now seeks enforcement of that order.

A. Standard of Review

A court must enforce the Board's order if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the administrative record viewed as a whole. Destileria Serrales, Inc. v. NLRB, 882 F.2d 19, 21 (1st Cir. 1989). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 22 (1st Cir. 1983),

[enforcement denied], 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in Belcon.

cert. denied, 464 U.S. 892 (1983) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)).

A court of appeals reviews the NLRB's orders with considerable deference. NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1049 list Cir. 1991). We will sustain inferences the Board reasonably draws from the facts, as well as its reasonable application of statutory standards to the facts and inferences. Soule Glass & Glazins Co. v. NLRB, 652 F.2d 1055, 1073 (1st Cir. 1981). We may not substitute our judgment for the Board's when the choice is "between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera v. NLRB, 340 U.S. at 488.

B. The Duty to Bargain

Under NLRA § 8(a)(5) and (1),[80] an employer has the obligation to bargain collectively with the representative of its employees. Section 8(d) of the Act, 29 U.S.C. § 158(d), provides that the duty to bargain includes the duty to "execut[e] . . . a written contract incorporating any agreement reached if requested by

[80] These sections provide: (a) It shall be an unfair labor practice for an employer--(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title. 29 U.S.C. § 158(a)(1) and (5).

either party." An employer commits an unfair labor practice in violation of section 8(a) (5) and (1) of the NLRA by refusing to sign a writt... contract incorporating agreed-upon terms or by otherwise repudiating an oral agreement. NLRB v. Strong, 393 U.S. 357, 359, 362 (1969); H.J. Heinz Co. v. NLRB, 311 U.S. 514, 525-526 (1941); NLRB v. Crimptex, Inc., 517 F.2d 501, 505-06 (1st Cir. 1975).

The Company argues that in the circumstances of this case it did not commit an unfair labor practice by refusing to sign a collective bargaining agreement based on the Union's acceptance on November 27 of its November 17 offer, and by withdrawing recognition from the union. It contends that the offer made on November 17 was no longer available when the Union's negotiating committee accepted it; that the committee's acceptance never resulted in a binding agreement because the Union's membership never ratified the purported agreement; and that the Company properly withdrew recognition from the Union because it believed, in good faith, founded on reasonable and objective factors, that the Union, in fact, clearly no longer represented a majority of the unit employees. We consider these arguments in turn.

II.

A. Whether the November 17 offer was still available when the Union accepted it

Although not bound by all the technical rules of contract law, the NLRB is free to fashion and apply general contract principles in the collective bargaining context. NLRB v. International Bhd. of Elec. Workers Local 22, 748 F.2d 348, 350 (8th Cir. 1984); Pepsi-Cola Bottlina Co. v. NLRB, 659 F.2d 87, 89 (8th Cir. 1981); NLRB v. Electra-Food Mach., Inc., 621 F.2d 956, 958 (9th Cir. 1980). The Board and courts have held that "[i]n the collective bargaining context, an offer will remain on the table unless the offeror explicitly withdraws it or unless circumstances arise that would lead the parties to reasonably believe that the offeror has withdrawn the offer." NLRB v. Burkart Foam. Inc., 848 F.2d 825, 830 (7th Cir. 1988); see Williamhouse-Resency, Inc. v. NLRB, 915 F.2d 631, 634-635 (11th Cir. 1990).

Here the ALJ, in findings affirmed by the Board, found "neither evidence nor contention" of express withdrawal by the Company prior to the Union's November 27 acceptance. Similarly, the AU found that nothing in the Company' s or Union's conduct or reaction prior to the Union's November 27 acceptance suggested that the parties believed, or had reason to believe , the offer of November 17 had been rejected, withdrawn or ceased to be open for acceptance.

We accept these findings as they are amply supported by substantial evidence in the record. The Company contends that the Union delegation's "storming out" of the November 17 meeting without setting another

meeting date or saying farewell was an "extremely negative response" which led management to infer a rejection of its proposal. However, the absence of any reference to withdrawal or rejection of the proposal in conversations between Thomas and O'Reilly on November 20 caused the ALJ to doubt that the employer believed its proposals had been rejected. In factual matters of this nature, we defer to the Board's resolution. The ALJ also thought, we think reasonably, that a mere uncommunicated, unilateral judgment by the Company that rejection had occurred would, by itself, be ineffective to remove its proposal from the table. We find no error. The Board acted well within its authority in finding that the offer of November 17, 1988, was still on the table when the Union's negotiating committee purported to accept it by telegram on November 27, 1988.

B. Ratification

The Company argues that no valid contract was ever entered into with the Union because the Union negotiating committee's acceptance of the November 17 proposal was never ratified by the Union members. The ALJ, in an analysis adopted by the Board, rejected this contention, finding that there was no express or implied mandate or agreement making membership ratification a precondition to a binding collective bargaining contract.

The NLRB has consistently held that unless parties have explicitly agreed that any agreement between the negotiators must be ratified by the employees, the

formality of a vote is not required to create a binding agreement. Newtown Corp., 280 NLRB 350 (1986), enforced, 819 F.2d 677 (6th Cir. 1987); Consumat Sys., Inc., 273 NLRB 410, 413 (1984); Martin J. Barry Co., 241 NLRB 1011, 1013 (1979), later proceeding, 278 NLRB 393 (1986); see also Houchens Mkt., Inc. v. NLRB, 375 F.2d 208, 212 (6th Cir. 1967) ("[W]hether or not [the] bargaining unit may enter into a binding contract with or without membership ratification . . is not an issue which the Company can insist upon without mutual agreement by the Union .")

The ALJ found, and it is undisputed, that neither the Iron Workers' International constitution nor the by-laws of the local union contain any provision requiring membership ratification of a collective bargaining agreement. The ALJ also found that there were no explicit discussions between the Company and the Union during the 1988 negotiations in which the Union advised the Company that membership ratification was needed to establish a contract. While there was evidence that membership votes were taken in 1988, and possibly before, the ALJ concluded, and the Board agreed, that such submission to membership votes fell short of establishing that ratification was a pre-condition to the formation of a binding agreement. While another determination might be possible, we think this conclusion was within the authority of the Board to reach on this record.

C. The Company's good faith belief that the Union no longer represented the majority of employees as a basis to withdraw recognition from the Union

The Company's most serious contention is that the Board erred in refusing to consider the Company's argument that, in declining to recognize the Union or to bargain further with it, the Company was acting pursuant to a well-supported good faith doubt that the Union still had majority support among those it supposedly represented. The Company first made this contention in a telegram sent on November 28, one day after the Union's negotiating committee had telegraphed its acceptance of the Company's outstanding offer of November 17. The Company points to various facts, all of which apparently occurred prior to the negotiating committee's November 27 acceptance, as indicative of the Union' s loss of majority support. Among other things, the Company asserts that some nine unit employees crossed the picket line on a daily basis during the strike; that as many as 13 of the original bargaining unit personnel had submitted resignations to the Union; and that 16 original unit employees had indicated that they did not support the Union.

The ALJ, however, refused to consider whether or not the Company's alleged good faith doubt, manifested on November 28, was justified by evidence indicating the Union had, in fact, lost majority status. He relied upon the Board's decision in Belcon. Inc. , 257

NLRB 1341 (1981) , for the proposition that, once a union has accepted the employer's contract offer, thus establishing a binding contract between the parties, the employer may not decline to bargain with the union under the terms of the contract on grounds of a good faith doubt of majority status.

The Board confirmed the ALJ' s determination, reiterating its support for the Belcon doctrine. See supra note 1. The Board's position, which it reiterated in its argument before us, goes back to NLRB decisions rendered in the 1970s: North Bros. Ford. Inc., 220 NLRB 1021 (1975), and Utility Tree Serv., Inc., 215 NLRB 806 (1974), supp. op., 218 NLRB 784 (1975), enforced, 539 F.2d 718 (9th Cir. 1976). In North Bros. Ford, the Board ruled that once a "final agreement on the substantive terms [of the collective bargaining agreement is] reached, and regardless of the status of any written instrument incorporating that agreement, [the employer is] not free to refuse to bargain even if it has lawful grounds for believing that [the Union] has subsequently lost its majority status." North Eros. Ford, 220 NLRB at 1022.

Underlying the Board's rationale is the so-called contract bar rule, a Board-created rule that once an employer and a union enter into a valid collective bargaining contract, the majority status of the union is presumed for the duration of the contract, not to exceed three years. El Torito-La Fiesta Restaurants. Inc. v. NLRB. 929 F.2d 490, 492-93 (9th Cir. 1991); Pioneer

Inn Assocs. v. NLRB, 578 F.2d 835, 838 (9th Cir. 1978). The rule has been applied by the Board to prevent challenges to a union's majority status "even if a majority of the employees withdraw their support." Pioneer Inn Assocs.,578 F.2d at 838.

In North Bros. Ford, the employer's good faith doubt centered on the union's loss of majority status occurring after the making of the contract. See 220 NLRB at 1021-22. Belcon was not expressly so limited, however, see 257 NLRB at 1346-47, and in cases like the present, the Board apparently believes that even if the Union lacked majority status at the very moment its negotiating committee accepted the employer's offer, a completed contract should be presumed, barring the employer from thereafter questioning the union's lack of majority support. Chicago Tribune Co. , 303 NLRB No. 106 (1991) ,enforcement denied, 965 F.2d 244 (7th Cir. 1992).

There is an obvious chicken-egg problem in this approach. If the Union in fact lacked majority status at the time of acceptance, should its acceptance be held to create a valid and binding contract that bars the employer from thereafter questioning the existence of majority status at that critical earlier time? The closest thing to a relevant justification of the Board's approach appears in the ALJ's opinion (subsequently reversed by the Seventh Circuit) in Chicago Tribune. The ALJ wrote:

> There is no reliable authority for the proposition that an employer may invoke a refusal to bargain or withdrawal of recognition after a contract has been reached. Good faith doubt is a difficult enough concept to litigate when alleged doubts are expressed in the form of a refusal to bargain; it would be an impossible concept to litigate if it could be invoked after a contract is reached and in the absence of a prior refusal to bargain not only to vitiate that contract but to dissolve the bargaining relationship. This would permit an employer to litigate an alleged doubt as it might have existed in his own mind at the time a contract was reached rather than at the time of an objective event, that is, a refusal to bargain or withdrawal of recognition. The cases do not permit such a subjective inquiry.

The Board in Chicago Tribune proceeded on the basis of the ALJ's opinion, without attempting any further explanation of its own. In briefs and argument before us, Board counsel made no mention at all of the decisions so far rendered in Chicago Tribune, and neither the ALJ nor the Board here have attempted to address the employer's

argument that the contract bar rule should not be applied to prevent an employer from attempting to question the very existence and validity of a contract for lack of majority status.

Even more troublesome, after argument in April 1992, neither party advised us that, on May 29, 1992, the Seventh Circuit had refused to enforce the bargaining order in Chicago Tribune. Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), reh'g denied, Nos. 91-2750, 91-2916, 1992 U.S. App. LEXIS 14485 (June 24, 1992). The Seventh Circuit's analysis has direct bearing here. Writing for the panel, Judge Posner refused to accept "the Board' s rule that a union' s unconditional acceptance of an offer for a collective bargaining contract is valid and binds the company unless circumstances have changed since the company's offer was made or renewed . where between the original offer and its renewal the union lost the support of the workers." Chicago Tribune, 965 F.2d at 250. The Seventh Circuit reasoned that while the employer might have been at fault for leaving its offer on the table, the interests of the unrepresented majority-- who had not desired representation by the union at the time the contract was supposedly agreed to could not properly be sacrificed to the interests of the repudiated union and to whatever considerations might support holding that the employer had waived his rights. See id. The Seventh Circuit relied upon International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961),

forbidding a company to sign a collective bargaining contract with a union that it knows does not have the support of a majority of the workers in the bargaining unit. See Chicago Tribune, 965 F.2d at 249-51.

In their briefs and argument before us, the parties did not explore to any degree the pros and cons of applying the contract bar rule against an employer on the basis of a contract made by a union that, at the time it accepted the employer's offer, may have lacked majority support . The Company raised the point, however, noting that in North Bros. Ford the loss of support had occurred only after the making of the contract and, on that basis, arguing for release from the contract bar rule.

We find disappointing the Board's failure to recognize that the mere rote citation of North Bros. Ford and Belcon does not answer the Company's contention. The Board seems to have mechanically applied what Judge Posner aptly terms, "the beguiling syllogism: an offer not withdrawn can be accepted at any time provided there are no changed circumstances; an agreement once accepted must be signed: a signed agreement creates an irrebuttable presumption that the union has majority support . " 965 F.2d at 250 (citations omitted). The Board has glossed over the analytically tough question presented here: should the making of a contract be irrebuttably presumed for purposes of the contract bar rule where the creation of the alleged contract, by the union's acceptance of the employer's offer, may have

come at a time the union lacked majority support? The ALJ in Chicago Tribune believed it would be impracticable not to presume a valid contract even in those circumstances. The Seventh Circuit held, to the contrary, that that approach conflicted with the firmly established principle that an employer may not contract with a minority union. See 965 F.2d at 250.

The National Labor Relations Board has the chief responsibility for developing coherent and correct labor negotiating rules. Especially as the relevant principles here are informed less by statutes than by Board policies set out in its decisions, the area is one where the Board's presumed expertise is key. Yet the Board cannot provide meaningful leadership through rote, unthinking, unexplained applications. The fitful quality of the Board's attention in the instant area was shown in two recent cases cited here by the Company, in which the Board appears to have overlooked altogether its North Bros. Ford and Belcon precedent. In enforcement proceedings culminating in NLRB v. Curtin Matheson Scientific. Inc., 494 U.S. 775 (1990), and NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989), cert. denied, 493 U.S. 924 (1989), the Board, without comment, allowed an employer to litigate an issue of good faith doubt after the union had accepted an outstanding offer. Without mentioning the Belcon doctrine, the Board plunged into the merits of the employer's asserted good faith doubt. See Curtin Matheson Scientific, Inc., 287

NLRB 350 (1987), enforcement denied, 859 F.2d 362 (5th Cir. 1988), rev'd, 494 U.S. 775 (1990); Bickerstaff Clay Prods. Co., 286 NLRB 295 (1987), enforcement denied, 871 F.2d 980 (11th Cir. 1989) , cert. denied, 493 U.S. 924 (1989) . The Board now suggests various reasons for its oversight in those cases, insisting that it was not deliberately abandoning Belcon. We accept the Board's insistence as true. We are not persuaded by the Company's arguments that Belcon was knowingly abandoned or that the Supreme Court, in Curtin Matheson, tacitly overruled it. What occurred looks like an unwitting oversight encouraged, perhaps, by a readiness to circumvent precedent in order to secure review of an important substantive issue. But the course taken does not reflect much credit on the Board Employers and unions are entitled to expect an even-handed application of the rules announced in the Board' s prior administrative decisions. If the Board and its General Counsel do not remember and follow Board precedent, how can others be expected to do so? And if, when the Board undertakes to apply its precedent, it does so, as here, without bothering to explain applications in factually distinguishable circumstances, it weakens the credibility of its policies.

The Board's conclusory ruling in the present case simply failed to address the argument that acceptance of an outstanding offer by a minority union should not be deemed to establish a valid collective bargaining

agreement that forever bars the employer from raising a good faith doubt. The Board nowhere addressed the Company's argument that a lack of majority status on the date the Union purported to accept the Company's outstanding offer should be distinguished from a good faith doubt of majority status based on events occurring after a valid contract was made. Can acceptance by an unrepresentative minority union create a binding contract?[81]

Particularly in light of the Seventh Circuit's decision in Chicago Tribune, we think the Board must revisit, clarify and explain the principles that it thinks apply in the present circumstances. We do not say its ultimate result need necessarily be different from what it was here. We are not ready to say that the Seventh Circuit's analysis should apply, nor, indeed, that we adopt the Seventh Circuit's holding in Chicago Tribune. This is an area where the courts should tread softly, with considerable deference to the Board's reasoned analysis. In the practical arena of labor negotiations, the Seventh Circuit's analysis may still be found wanting as a yardstick. But the Board, by default, has left us without the policy guidance and reasoned analysis needed to decide the issue. The question is not a purely legal one, but calls for the Board's

[81] We do not, of course, say that the Union necessarily lacked majority support here. The ALJ expressly refrained from making findings as to that issue, relying instead on the contract bar rule to prevent the employer from raising the matter

reasoned application of its expertise. Reviewing courts are entitled to have that expertise demonstrated in a meaningful Board opinion, rather than in a laconic rule of thumb presented without reasoning and without attention either to the employer's arguments or to underlying policy concerns (such as the attention due to the rights of unrepresented workers).

A court may require that the Board's decision "be supported by articulate, cogent, and reliable analysis." Northport Health Servs., Inc. v. N.L.R.B., 961 F.2d 1547, 1553-54 (11th Cir. 1992); accord Williams Enters., Inc. v. N.L.R.B., 956 F.2d 1226, 1235-36, 1240 (D.C. Cir. 1992); Hyatt Corp. v. N.L.R.B. 939 F.2d 361, 367'68, 376 (6th Cir. 1991); Pacific Northwest Newspaper Guild. Local 82 v. N.L.R.B., 877 F.2d 998, 1001-03 (D.C. Cir. 1989); Teamsters Local Union 171 v. N.L.R.B., 863 F.2d 946, 957-59 (D.C. Cir. 1988), cert. denied sub nom. A. G. Boone Co. v. N.L.R.B., 490 U.S. 1065 (1989); Hotel Holiday Inn de Isla Verde v. N.L.R.B., 723 F.2d 169, 172-73 (1st Cir. 1983).

Accordingly, while we shall retain jurisdiction, we remand to the Board for its further consideration.[82] We direct the Board to hear additional argument from the

[82] Under the statute granting this court jurisdiction to entertain petitions for enforcement of Board orders, the court has the "power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting

parties on the principles to be applied where, after the Union's supposed acceptance, an employer seeks to present evidence that at the time of the Union's acceptance, it lacked majority support. Following argument, the Board should issue a reasoned opinion stating the appropriate rule or rules it proposes to apply, and resolving that question here in accordance with those articulated principles. As we have said, the Board's result may or may not be the same as before. However, the Board's opinion should include a discussion of the Seventh Circuit's ruling in Chicago Tribune, and of the legal and policy principles (as well as practicalities) it believes are controlling, and of the application of those considerations to the facts, While we set no specific time limit, we ask the Board to act with expedition, and to send a certified copy of the record and its opinion and further order to the clerk of this court as soon as it can.[83]

aside in whole or in part the order of the Board." 29 U.S.C. § 160(e). This power has been applied to authorize remand to the Board for further proceedings pursuant to the court' s opinion while retaining jurisdiction. See, e.a., N.L.R.B. v. New York Univ. Medical Ctr., 702 F.2d 284, 299 (2d Cir. 1983) (remanding to Board, while retaining jurisdiction, for application of proper legal standard), vacated on other grounds, 464 U.S. 805 (1983); N.L.R.B v. Mount Desert Island Hosp., 695 F.2d 634, 642 list Cir. 1982); New Alaska Dev. Corp. v. N.L.R.B., 441 F.2d 491, 495 (7th Cir. 1971) (retaining jurisdiction and remanding for required detailed factual findings).

[83] In the event the Board determines that further

For the sake of clarity, we reiterate that we are prepared to enforce the Board's determinations, (a) that the Company's offer remained open and "available" on November 27, when the Union purported to accept it; and (b) that membership ratification Per se was not a requirement. Our doubt focuses on whether and why the employer should not be allowed to try to show that, at the time of the Union's purported acceptance of the Company' s outstanding offer, the Union was lacking in majority support and therefore incapable of creating by its acceptance a valid contract.

We decline to enforce the order at this time, and the cause is remanded to the Board for further Proceedings consistent herewith, with jurisdiction to be retained by this court.

Adm. Office, U.S. Courts - Blanchard Press, Inc., Boston, Mass.

fact-finding is required, necessitating a remand to the ALJ, we direct the Board to notify us to this effect and authorize the Board to then move to terminate our retained jurisdiction over the present enforcement petition.

CDO

303 NLRB No. 90

D--2090

Hudson, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUCIELLO IRON WORKS, INC.

and

Case 1--CA--25969

SHOPMEN'S LOCAL UNION NO. 501 a/w INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS (AFL--CIO)

DECISION AND ORDER

On November 24, 1989, Administrative Law Judge Norman Zankel issued the attached decision. The Respondent filed exceptions and a supporting brief,[84] and

[84] On May 3, 1990, the Respondent filed a motion to file a supplementary memorandum of law on the applicability and

the General Counsel resubmitted his brief to the judge in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions [85] and to adopt the recommended Order.

impact of the U.S. Supreme Court's decision in NLRB v. Curtin Matheson Scientific, Inc., 110 S.Ct. 1542 (1990). The Board granted this motion on May 8, 1990, stating that all parties could file such briefs. Only the Respondent filed a supplementary memorandum of law.

[85] We agree with the judge that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority statue. Belcon, Inc., 257 NLRB 1341, 1346 (1981); North Bros. Ford, 220 NLRB 1021, 1022 ~1975). We also agree with the judge that the Board's decision in Bickerstaff Clay Products, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in Belcon.

In agreeing with his colleagues that it is unnecessary to consider the issue of good-faith doubt, Member Oviatt relies on the fact that the Respondent not only failed to withdraw its offer prior eo the Union's acceptance but that it did not immediately

D--2090

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. June 27, 1991

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

communicate to the Union its "good-faith doubt" that the Union had lost ire majority status. He notes parenthetically that to allow a proposal to remain on the bargaining table after the Respondent has e good-faith doubt as to the Union's majority status may be tantamount to bargaining with a minority union---and thus could leave the Respondent vulnerable to a Sec. 8(a)(2) charge.

D--2090

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully withdraw recognition from, or refuse to bargain with, Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL--CIO) as the

exclusive collective bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of our Hudson, Massachusetts facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act (except working foremen).

WE WILL NOT fail and refuse to sign and implement the collective-bargaining agreement which has been found to have been created on November 27, 1988.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the above-named Union, put in writing, sign, and put into effect, retroactively to November 27, 1988, the collective-bargaining agreement which the Union accepted that date.

WE WILL make whole, with interest, all employees to whom the November 27, 1988 collective-bargaining agreement applies, for all lost wages and other benefits they may have suffered as a result of our failure to sign an

agreement containing our November 17, 1988 proposals and from our withdrawal of recognition from the Union on November 28, 1988.

AUCIELLO IRON WORKS, INC.
(Employer)

Dated_____By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10 Causeway Street, Sixth Floor, Boston Massachusetts 02222-1072, Telephone (617)-565-6739.

JD-287-89
Hudson, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON D. C.

AUCIELLO IRON WORKS, INC.

and

SHOPMEN'S LOCAL UNION No.501 a/w
Case No. 1-CA-25969
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS
(AFL-CIO)

Avrom J. Herbster, Esq., of Boston, MA
for the General Counsel

John D. O'Reilly, III, Esq..,
O'Reilly and Grosso, of
Framingham, MA for the Employer

Mr. Robert Thomas, General Organizer,
of Smithfield, RI for the Union

DECISION

NORMAN ZANKEL, Administrative Law Judge: This case was tried before me on June 21 and August 8 and 9, 1989 at Boston, Massachusetts upon a Complaint and Notice of Hearing issued on January 20, 1989 by Michael R. Walsh, Esq., Acting Regional Director for the First Region of the National Labor Relations Board (the Board).

The Complaint, based on a charge and an amended charge filed on December 1, 1988[86] and January 17, 1989, respectively, alleges that Since on or about November 28 the Employer refused to bargain with the Union as exclusive collective-bargaining representative of an appropriate unit of employees[87], in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act), by refusing to execute a written collective-bargaining agreement and by withdrawing

[86] All dates hereafter are in 1988, unless otherwise indicated.

[87] I granted General Counsel's oral motion at the hearing to amend the Complaint so the unit description would read: "All production and maintenance employees (as defined in Section 1 of the [parties'] 1985-1988 contract) employed by the Employer at its Hudson, Massachusetts facility, but excluding all office clerical employees, guards and supervisors as defined in the Act."

All parties agree this unit is appropriate for collective-bargaining. I so find.

recognition from the Union as bargaining agent for those unit employees.

The Employer filed a timely Answer to the Complaint. The Answer admitted certain allegations, but denied the Employer committed the alleged
unfair labor practice.

All parties were given full opportunity to produce relevant evidence through witnesses and documents; to examine and cross-examine witnesses; and to make oral arguments. Post-hearing briefs were timely received from Counsel for the General Counsel and counsel for the Employer. Based upon my observation of the conduct and demeanor of the witnesses, and the record as a whole, I make the following:

Findings and Conclusions

I. Jurisdiction

Jurisdiction is uncontested. The Employer, a corporation engaged in business as a metal fabricator, has had an office and place of business in Housing, Massachusetts at all material times. During the calendar year immediately before Complaint issuance, the Employer sold and shipped products, goods and materials exceeding $50,000 in value from its Housing facility directly to points outside of Massachusetts; and, in the same period and at the Housing facility, purchased and received products,

goods and materials exceeding $50,000 in value directly from points outside of Massachusetts.

The Employer admits, the record reflects, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

All parties agree, the record reflects, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Issue

Did the September-November, 1988 collective bargaining negotiations between the Employer and Union result in an agreement to which they were bound and which precluded the Employer from lawfully withdrawing recognition from the Union based upon an assertion of good-faith doubt of the Union's majority status?

I shall find a collective-bargaining agreement between the Employer and Union came into existence on November 27, 1988 and that, consequently, the Employer's admitted November 28 withdrawal of recognition from the Union was unlawful.

I find the stated question encompasses the principal, and dispositive, issue of the instant case. As noted above, the Employer admitted it withdrew recognition from the Union. But the Employer asserts that action was based upon objective considerations which caused it to have a good-faith doubt of the Union's majority status. Both

Counsel for the General Counsel and for the Employer vigorously, and fully, litigated the sufficiency and timeliness of the withdrawal of recognition.

In view of my disposition of the principal issue, I conclude no useful purpose would be served by a discussion and analysis of the good-faith doubt issue. See Belcon, Inc., 237 NLRB 1341, 1346 !1981) where the Board left undisturbed Judge Myatt's explicit conclusion it is unnecessary to deal with that issue in situations where the facts establish a union's acceptance of collective-bargaining proposals before an employer withdraws its offer[88].

III. The Alleged Unfair Labor Practice[89]

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[88] I am mindful that Bickerstaff Clay Products, Co., Inc., 286 NLRB No. 27 (1987), enf. den. 871 F.2d 980 (11th Cir. 1989), in which the Board held an acceptance which preceded offer withdrawal established a binding agreement, contains Judge Robertson's and the Board's treatment of the good-faith doubt issue. No reason for such discussion in Bickerstaff is apparent.

Inasmuch as the Board, in Bickerstaff, did not overrule well-established precedent holding irrelevant an employer's good-faith doubt of union majority status once agreement on a contract's substantive terms has been reached (North Bros. Ford, Inc., 220 NLRB 1021, 1022 (1975); Utility Tree Service, Inc., 215 NLRB 806, 807 (1974)). I consider it proper, in all the instant circumstances, to eliminate the good-faith doubt issue from my further consideration.

[89] The operative facts are substantially undisputed. Where

A. Background

The Board certified the Union as the exclusive collective-bargaining representative of the employees within the appropriate unit described in footnote 2, above, in 1977. Since that time, the Union and Employer negotiated four successive collective bargaining agreements which applied to those unit employees. The most recent of those contracts was due to, and did, expire on September 25, 1988.

Generally, the relationship between the contracting parties was uneventful through the years. The Union conducted no strikes and pursued no grievances or arbitrations until the instant dispute.

B. Scenario of the Present Dispute

The Employer and Union began negotiations for a new collective-bargaining agreement on September 21. Robert Thomas, International Representative/General Organizer; Local Business Agent (then Local President), David Mortimer; and Steward Joseph Parenti comprised

material variations exist, they shall be resolved. My description of facts in this, Section III of the decision, is a composite of undisputed testimony, documentary evidence and stipulations. Not all evidence, or argument based on it, is reported. Omitted matter is deemed irrelevant, superfluous or of no probative value to the principal issue.

the Union's negotiating team. Attorney John D. O'Reilly III; Gerald C. Sauer, the Employer's Controller; and Plant Supervisor Manlio DeGrandis were the Employer's team. The Union presented its written proposal for a new contract. Some agreements, characterized as preliminary, were reached but major substantive subjects remained unresolved.

The next bargaining session occurred on September 30. The Employer presented its written contract proposals. Extensive discussion ensued regarding wages, medical insurance premiums and pension plan. There is disagreement among Thomas, Mortimer and Sauer as to whether or not the negotiators reached total agreement on a new contract's terms during this session. This disagreement need not be resolved. I find it irrelevant because it is undisputed that a vote among the Union membership was taken immediately following the bargaining session that day, and whatever was presented to them had been rejected.

The negotiating teams again met on October 4 or 5.[90] They reviewed their respective positions upon the contract issues. At one point, Thomas met privately with attorney O'Reilly. Thomas testified (without contradiction) he suggested that if the Employer, in effect, would adopt a Union contract proposal as its own, there would be no need for the negotiating committee to submit the proposal to the

[90] Thomas testified the meeting was on October 4. Sauer claimed it was on the following day. There is no need to resolve this difference.

Union membership for a vote. O'Reilly did not accede to this suggestion.

Another negotiating session was held on October 13. The Employer modified its proposal on health insurance premiums to address the apparent reason for membership rejection on September 30, but also reduced its wage proposal. The Union negotiators said they. could not agree to these proposals but nonetheless would submit them to a membership vote, at a meeting already scheduled for that evening, without a recommendation for acceptance.

At that evening's Union meeting, the Union membership voted to reject the Employer's October 13 proposal, and voted to strike. A strike began on October 14.

On October 18, the negotiating teams met in the presence of a federal mediator. The Union made another proposal for medical insurance premiums and wages. The Employer's bargaining team made no commitment concerning those proposals. The parties met again on October 26, but no progress was made toward agreement upon a new contract.

On November 17, the negotiating teams met. The mediator was present. The Employer presented numerous proposals. Oral proposals were made on medical insurance premiums, wages and overtime. Written proposals were made which related to grievance arbitration, supervisory performance of bargaining unit work, and management rights. The written proposals contained extensive changes

in provisions of the recently-expired collective-bargaining agreement.

The Union team requested a caucus to study the proposals. Upon examination, the team decided more time was needed. They asked for adjournment of that bargaining session. The mediator advised the Employer's team of this request. Sauer testified the Union negotiators "stormed by" the Employer's team. Thomas and Sauer agree the Union did not expressly reject the Employer's November 17 proposals; and Sauer, during his Cross-Examination, acknowledged that the Employer had not removed those proposals from the bargaining table on that date.

On or about November 20, Thomas telephoned attorney O'Reilly. Thomas asked whether there would be any advantage to sitting down and negotiating to arrive at an agreement. O'Reilly said he did not envision any change in the Employer's position. There is no evidence to show either that Thomas said the Union rejected the Employer's November 17 proposals or that O'Reilly said those proposals had been withdrawn. Sauer testified O'Reilly reported this telephone conversation to him but Sauer, even then, acknowledged no instructions were given to O'Reilly to withdraw the proposals.

After his November 20 conversation with O'Reilly, Thomas telephoned Mortimer and instructed him to contact the employees, inform them what occurred, and recommend they accept the November 17 proposals and

end the strike. Mortimer complied. Mortimer testified he reached 8-10 employees.

On November 26, Mortimer reported to Thomas that the employees he polled agreed to accept the November 17 proposals and return to work.

On November 27, Thomas sent a telegram, signed with Mortimer's name, to Auciello, as follows:

> "After careful consideration the proposed contract submitted by your company on November 17 1988 to Local Union 501 has (sic) unanimously ratified by our negotiating committee. The strike at your plant has concluded as of this date and employees have been advised to work on Monday November 28, 1988."

Auciello received the Union's telegram on November 27. The next day, O'Reilly telegraphed the Union, stating:

> "Employer position in response to your notice of November 27 is as follows: 1. Employer offer of November 17 was rejected by Local 501 and is no longer open for unilateral acceptance. 2. In any event your claimed ratification (sic) limited to negotiating (sic) committee and excluding rank and file membership is insufficient. Employer now has reason to believe that Local 501 no longer

represents a majority of employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations."

The strike ended as stated in the Union's November 27 telegram, but the Employer has remained steadfast in its refusal to sign a collective-bargaining agreement containing the terms of the Employer's November 17 proposals and in its withdrawal of recognition from the Union.

C. Analysis

(1) The Ratification Issue

The Employer, in part, contends that ratification of negotiated contract terms by the applicable bargaining unit employees was a pre-condition to the fornication of a collective-bargaining agreement with the Union. The General Counsel argues that the instant circumstances show ratification was not a requirement for an enforceable agreement to come into existence.[91]

[91] The Employer also urges that, even if ratification were not needed to establish a contract, the offer which the Union purportedly accepted had been withdrawn prior to acceptance. This argument will be addressed further below.

The evidence regarding past practice of ratification, and what was said and done in that connection during the 1988 negotiations is critical to resolution of this case. Thomas and Mortimer testified with respect to ratification practices with the Employer. Ralph duciello, Employer's vice-president for Production, and Sauer, testified as to the Employer's perspective of ratification. I credit the testimony of each of these witnesses, especially respecting ratification. Each of them vas direct, forthright and candid. The relevant evidence regarding ratification follows.

It is undisputed that neither the Ironworkers' International Constitution nor the by-laws of the Local Union contains any provision regarding ratification of collective-bargaining agreements. Mortimer acknowledged the terms agreed-to at the bargaining table in each of the three previously-negotiated contracts were submitted by the Union's negotiating committee to the membership for a vote, He said the agreements were ratified "as a matter of course".

Thomas explicitly denied the Union negotiators ever told their Employer counterparts that membership ratification was needed "before there would be a final contract" during the 1988 negotiations (Tr.26). He was unchallenged in that connection.

Auciello initially testified, in general terms, that the "Union committee always stated that they must have a ratification of the men" (Tr.162). During Cross-Examination, however, Auciello explained that he

had not personally participated in the negotiations, but relied upon Sauer for reports. Then, Auciello conceded that Sauer did not inform him that the Union negotiators said that ratification was needed before the parties had an agreement. Instead, Auciello testified he had been advised the Union committee was going to make recommendations to the membership for a vote, and that was consistent with past practice.

Sauer, referring to the negotiations conducted in years before 1988, was asked and answered questions as follows, during his direct examination:

> "Q. Did they (the Union) reach agreement with your committee across the table and then express a need to have that agreement ratified?
>
> A. That is correct
>
> Q. And did they, in fact, go through the ratification process in each of these negotiations?
>
> A. Yes, they had...
> Q. And did they, subsequent to the ratification process, report back to management the results of the ratification vote?
>
> A. That is true." (Tr. 392).

Regarding the 1988 negotiations, Sauer (during his direct examination) testified that "...after we reached an agreement with the Union...Mr. Thomas said that they had to go back and have the agreements that we have made across the table ratified by the rank and file" (Tr. 393). However, during Sauer's Cross-Examination, he conceded that Thomas "...did not say if there wasn't ratification there would be no contract" (Tr. 420).

In sum, I find the ratification evidence shows:

a. no written mandate existed which required proposed collective bargaining agreements to be submitted to Union membership votes before those agreements could become binding;

b. no explicit discussions occurred between the Employer and Union during the 1988 negotiations by which the Union told the Employer that membership ratification was needed to establish a contract;[92]

c. the evidence that the Union submitted contract terms to membership votes in negotiations before

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[92] Indeed, I conclude Thomas' October 4 or 5 solicitation of an Employer proposal which would not be subject to Union membership vote tends to support the view that the Employer had been told implicitly that ratification was not a condition precedent to a binding agreement.

1988, and during the 1988 negotiations, is insufficient basis to conclude that the bargaining history shows ratification was a precondition to reaching a binding agreement in the totality of circumstances in this case.

Some of that evidence was presented by Auciello as pure hearsay and in generalized terms. Hence, I find it unpersuasive.

Sauer's testimony that Union representatives said they would submit contract terms to membership ratification in years before 1988 is the strongest evidence supporting the Employer's contention. This is especially true when viewed in the light of the fact (as has been shown) that at least two membership votes were taken in 1988. Nonetheless, I conclude the mere submission to membership votes falls short of making ratification a requirement of the formation of a binding agreement.

The Board has consistently held that where there was no evidence of an explicit agreement between the negotiating parties about union ratification, the formality of such a vote by the union membership is not required as the foundation of a binding collective-bargaining agreement. Newtown Corporation, 280 NLRB 350 (1986); Consumat Systems, Inc., 273 NLRB 410, 413 (1984); Martin J. Barry Company, 241 NLRB 1011, 1013 (1978); C & W Lektra Bat Co., 209 NLRB 1038, 1039 (1974), enfd. 513 F.2d 200 (6th Cir., 1975).

In Childers Products Company, 276 NLRB 709 (1985), more compelling circumstances existed for finding

ratification a requirement of contract formation than in the case before me. The parties, in Childers, signed a memorandum of agreement containing the terms agreed-to by the negotiators. That memorandum ended with the line "THIS AGREEMENT SUBJECT TO RATIFICATION", although no one discussed the meaning of the quoted sentence and there was no discussion of ratification during the negotiations. No ratification vote was taken by the union membership.

The Board left undisturbed Judge Nations' observation that "The condition precedent of 'ratification' means ratification as defined by the Union in its internal procedures. There was no understanding established by the 'parties during negotiations concerning what the Union meant by ratification" (276 NLRB at 711). The Board affirmed the conclusion that those circumstances supported a finding that the method of ratification was within the union's exclusive control and sustained the finding that a vote of the union's executive committee satisfied the ratification issue in Childers.[93]

I find the instant case analogous to Childers. In both cases, the parties had no explicit discussion concerning the

[93] The principle of union self-determination of sufficiency of ratification is well-established. See Zayre Department Stores, 289 NLRB No. 153 (1988); M & M Oldsmobile, Inc., 156 NLRB 903, 905 (1966); North Country Motors, Ltd., 146 NLRB 671 (1964).

ratification process; no ratification procedure was mandated by the union constitution or by-laws;[94] no formal ratification vote was taken by the members on the offer which the union accepted;[95] and the agreement was accepted by a vote of some body of the union (here, the Union's negotiating committee; in Childers, the executive committee). I conclude application of the decisional precedent cited above militates in favor of finding the instant facts show ratification by the Union members was not required to form a binding collective-bargaining agreement in the instant case.

Finally, I conclude the Employer's reliance on the Union's submission of contract terms to membership votes in negotiating years before 1988, and even during the 1988 negotiations, as establishing such ratification votes a precondition to contract formation, is misplaced. Even union negotiator's remarks regarding intention to submit contract terms to a vote by which employer's negotiators "felt" or "understood" ratification was a precondition to a

[94] This observation is unaffected by the fact that the Childers union constitution contained language regarding ratification, while no ratification language whatsoever appears in the instant case. The Childers language clearly is discretionary.

[95] " Arguably, Mortimer's polling of members during the week before acceptance can comprise a ratification vote. If so, the instant Employer is divested of its argument that the membership did not vote to ratify a contract.

binding agreement, were insufficient to make it so (Seneca Environmental Products, 243 NLRB 624, 627 (1979).

Based upon all the above, I find that the evidence in the instant case, when assessed in light of the applicable precedent,[96] does not show that ratification by the Union's membership was a prerequisite to the formation of a collective-bargaining agreement between the Employer and Union. I therefore find, in the circumstances of the instant case, a unanimous vote of the Union's negotiating committee could effectively accept a pending offer for a collective-bargaining agreement.

These findings, however, do not end the inquiry. It is equally important to determine whether or not the Employer's November 17 proposals remained in existence as a contract offer when the Union signified its unanimous "ratification".

(2) Withdrawal of Recognition

There is no dispute that the Employer's extensive oral and written proposals of November 17 effectively comprised a complete contract. However, the Employer,

[96] Apparently believing in the efficacy of its position, the Employer has cited no authority to support its contentions regarding ratification. In addition to studying the cases I have cited above, I have examined cases which eight support the Employer's position contained in an exhaustive analysis of this subject by Board Chairman Stephens" concurring opinion in Sierra Publishing Company d/b/a The Sacramento Union, 296 NLRB No. 65 (1989).

contrary to the General Counsel and Union, argues its proposals were rejected when the Union team "stormed" out from the November 17 negotiations,[97] and there was no offer pending that the Union could have accepted[98] by the Union on November 27.

Under Board law, the formation of collective-bargaining agreements is not necessarily controlled by technical rules of contract law. Ben Franklin National Bank, 278 NLRB 986, fn.2 (1986). The Board's policy regarding offer and acceptance of collective-bargaining agreement terms was summarized by Judge Harmatz in Pepsi Cola Bottling Company of Mason City, Iowa, 251 NLRB 187, 189 (1980), enfd. 659 F.2d 87, 90 (8th Cir. 1981), as follows:

> "...a complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance in tote must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which

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97 I recognize the Employer seeks to justify its withdrawal of recognition by asserting its good-faith doubt-of-majority argument. For reasons discussed above, I find it unnecessary to deal with this argument in this analysis.

98 That the language of the Union's November 27 telegram constitutes an acceptance is unchallenged.

> the offer was expressly made contingent at a time prior to acceptance."

The Eighth Circuit's enforcement decision approved this policy (see footnote 4, the Court's decision), and restated it this way:

> "Under this policy (of the National Labor Relations Board), an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn" (Footnote omitted).

Clearly, there is neither evidence nor contention that the instant Employer expressly withdrew its November 17 contract proposals any time before the Union's November 27 acceptance telegram. Thus, the focus turns to an examination of whether or not the evidence supports a conclusion that some event occurred which "defeased" the proposals, or from which the parties could "reasonably believe" they had been withdrawn. I conclude the record does not contain sufficient evidence from which it can be found that the November 17 proposals were no longer open for acceptance on November 27.

As noted above, the Employer theorizes there was no offer open for acceptance. The only evidence to support such a theory shows the Union team "stormed" away from

the November 17 bargaining session. However, there is no evidence that any member of the Union team made any contemporaneous remarks, during the team's angry exit from that session, which could be interpreted as a rejection of the Employer's proposals.

Moreover, I find the contents of attorney O'Reilly's conversation with Thomas on or about November 20 illuminating, and contrary to the Employer's position. No evidence was presented to show either that there was an express withdrawal of the November 17 proposals during that phone discussion or that anything was said Which indicates either of the parties believed the Union's November 17 actions constituted circumstances which formed a foundation of a reasonably based conclusion the proposals had been withdrawn. If the Employer believed its proposals had been rejected, I find it reasonable to expect something to that effect would have been said during the Thomas O'Reilly phone conversation.

Viewing the evidence in a light most favorable to the Employer, it is arguable that the Union's November 17 actions reasonably give rise to a conclusion the Employer's proposals had been rejected. Such conclusion, however, would not compel adoption of the Employer's position.

There is nothing in the Board's or Court's Pepsi Cola decision which licenses or contemplates the kind of unilateral judgment the Employer espouses in this case. As I understand the Pepsi Cola language, the special circumstances which might permit a determination that

contract offers have been withdrawn are those from which both parties to negotiations could reasonably draw the same conclusion. No party has cited, nor has my independent research uncovered, any cases which-disengage parties from the statutory collective-bargaining scheme simply upon their separate opinions and surmise of the effects of the other's conduct.

Moreover, even assuming the Employer unilaterally could presume its proposals had been rejected, and that presumption were correct, it is clear that the initial rejection could be revoked at any time before an effective withdrawal. This is so because federal labor policy and principles encourage the formation of collective-bargaining agreements as a stabilizing factor in labor-management relations (Pepsi Cola, supra; Penasquitos Gardens, Inc., 236 NLRB 994, 995 (1978), enfd. 603 F.2d 223 (9th Cir. 1979).

In conclusion, I find the Employer's November 17 proposals were open for acceptance on November 27 and the Union's November 27 telegram constituted their acceptance before withdrawal so as to create a binding collective-bargaining agreement between those parties. Accordingly, I also find the Employer's November 28 withdrawal of recognition untimely, as it occurred during the term of the contract which became effective the previous day (Consumat Systems, Inc., supra, fn.4 and cases cited therein; Belcon, Inc., supra).

Upon the basis of the above factual findings and upon the entire record in the case, I make the following:

IV Conclusions of Law

1. Auciello Iron Works, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO) is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of the Employer's Hudson, Massachusetts facility, but excluding all office clerical employees, guards and supervisors as defined in the Act (except working foremen) constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.[99]

4. Ratification, by the Union's general membership, of terms for collective-bargaining agreements between the Employer and Union involved in this case is not required to form a binding collective-bargaining agreement.

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[99] This unit description conforms to the parties' agreement (See footnote 2, above).

5. The Employer's November 17, 1988 proposals for a collective-bargaining agreement remained pending for acceptance on November 27.

6. The Union's November 27, 1988 telegram constituted acceptance of the Employer's November 17 proposals and created a collective-bargaining agreement which the parties are bound to sign.

7. The Employer's November 28, 1988 withdrawal of recognition from the Union was untimely.

8. By failing to sign a collective-bargaining agreement containing the terms of the November 17 proposals, the Employer engaged in, and is engaging in, a refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act.

9. By having withdrawn recognition from the Union on November 27, 1988, the Employer engaged in, and is engaging in, a refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act.

10. The unfair labor practices identified above in Conclusions of Law paragraphs 8 and 9 affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

The unfair labor practices found require that the Employer be ordered to cease and desist from continuing them and to take certain affirmative action designed to effectuate the policies of the Act.

To rectify the Employer's unlawful failure to sign and implement a collective-bargaining agreement, and its untimely withdrawal of recognition, I find it necessary to order the Employer, upon the Union's request, to reduce to writing, sign, and retroactively implement the collective-bargaining agreement which I have found was created on November 27, 1988.

Also, I will order the Employer to make whole all employees to whom the aforesaid collective-bargaining agreement applies for any loss of wages and other benefits suffered as a result of the Employer's failure to sign and give timely effect to that agreement. Those wages and benefits, if any, shall be computed in accordance with the Board's formula in Ogle Protection Service, 183 NLRB 682 (1970), with interest computed under New Horizons for the Retarded, 283 NLRB 1173 (1987).

Further, the order will require the Employer to refrain from, in any like or related manner, interfering with, restraining and coercing employees in the exercise of their rights which the Act guarantees.

Finally, the Employer will be ordered to post an appropriate Notice to Employees.

On the above findings of fact, conclusions of law, and the entire record, I issue the following recommended:

ORDER[100]

Auciello Iron Works, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of employees in the bargaining unit found appropriate, and described in Conclusion of Law paragraph 3, above.

(b) Failing and refusing to sign and implement the collective-bargaining agreement which has been found to have been created on November 27, 1988.

[100] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings and conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On the Union's request, reduce to writing, sign and implement retroactively to November 27, 1988 the collective-bargaining agreement which the Union accepted on that date.

(b) Make whole all employees to whom the November 27, 1988 collective-bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that collective-bargaining agreement and its withdrawal of recognition from the Union. Monies due under this make-whole provision are to be computed according to the formulas described in the Remedy section above.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to determine the amounts owing under the terms of this Order.

(d) Post at its Audson, Massachusetts facility copies of the attached notice marked "Appendix".[101] Copies of said notice, on forms provided by the Regional Director for Region 1 of the Board, after being duly signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1 of the Board, in writing, within 20 days from the date of this Order, what steps the Employer has taken to comply with it.

Dated at Washington, D.C.
November 24, 1989

Norman Zanlkel
Administrative Law Judge

[101] In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD".

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board
An Agency of the United States Government

AFTER A HEARING AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND HAS ORDERED US TO POST THIS NOTICE AND ABIDE BY ITS TERMS

The Act gives employees the following rights:

To organize;
To form, join, or assist any union;
To bargain collectively through representatives of their own choice;
To act together for other mutual aid or protection;
To choose not to engage in any of these protective activities.

WE WILL NOT unlawfully withdraw recognition from, or refuse to bargain with, SHOPMEN'S LOCAL UNION NO. 501 a/w INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS (AFL-CIO) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of our Hudson, Massachusetts facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act (except working foremen).

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce our employees in the exercise of any of the rights described at the top of this notice.

WE WILL, upon request of the above-named union, put in writing, sign and put into effect, retroactively to November 27, 1988 the collective-bargaining agreement which the union accepted that date.

WE WILL make whole, with interest, all employees to whom the November 27, 1988 collective-bargaining

agreement applies, for all lost wages and other benefits they may have suffered as a result of our failure to sign an agreement containing our November 17, 1988 proposals and from our withdrawal of recognition from the Union on November 28, 1988.

AUCIELLO IRON WORKS, INC.

Dated:_____ By:_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 6th Floor, Thomas P. O'Neil, Jr. Federal Building, 10 Causeway Street, Boston, Massachusetts 02222-1072, Telephone Number 617-565-6700.